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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION),

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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THE QUESTION PRESENTED

Does the "political question" doctrine immunize the United States from a suit for damages by an innocent commercial vessel which struck a mine secretly placed in Nicaraguan waters by CIA operatives who

recklessly and negligently carried out directives of the President?

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Petitioners Chaser Shipping Corp. and Den Norske Krigsforsikring For Skib, Gjensidig Forening, hereby advise the Court that neither entity has any corporate parent, subsidiaries or affiliates.

TABLE OF CONTENTS

PAGE

OPINIONS BELOW..... 1

JURISDICTION..... 1

STATEMENT OF THE CASE..... 2

The CIA was involved in the Mining of Nicaraguan Harbors..... 4

The Mining Operations in Nicaragua Were Carried Out in a Manner Contrary to International Law and The Prior Practice of the United States..... 9

The Action Filed by Petitioners... 13

REASON FOR GRANTING THE WRIT:

THE LOWER COURTS DESPERATELY NEED GUIDANCE AS TO WHEN IT IS PROPER TO DISMISS AN OTHERWISE JUSTICIABLE CLAIM ON "POLITICAL QUESTION" GROUNDS..... 15

A. This case is one in which the assertion of the "political question" doctrine by the Executive Branch blinded the eyes of the courts below to the fact that no political question is actually involved..... 15

B. This case involves only liability for damages resulting from the grossly negligent manner in which a policy decision was carried out, and does not question the policy decision itself.

Therefore the court below erred in affirming its dismissal..... 17

C. A "political question" is raised in cases involving foreign relations only when a plaintiff attacks the rationale behind the foreign policy determination. This is not the case here..... 19

D. This case, involving only a claim for damages in tort, is well within the traditional bounds of justiciability by the federal judiciary, and well within its areas of expertise.. 22

E. The gravamen of this action is that the failure of the CIA operatives to insure that proper widespread warnings of the mining were issued was a reckless disregard for the rights of others..... 26

F. There is no absence of judicially discoverable and manageable standards for adjudication of this case on the merits..... 29

G. There would be no reason in this case for the trial court to delve into classified and sensitive diplomatic considerations behind the mining..... 33

H. A judicial determination of the merits of these claims would not require the court to monitor the Executive's conduct of foreign relations nor pose a potential for embarrassment from

multifarious pronouncements by various departments on one question..... 34

I. Compensating innocent third parties for damage was a clearly foreseeable risk of not giving adequate warnings of the mining of Nicaraguan harbors... 37

J. The courts below erroneously extended the "political question" doctrine so as to shield the Government from liability for the very types of claims encompassed in the Suits in Admiralty and Federal Tort Claims Acts... 38

CONCLUSION:

For the reason set forth above, this Petition for Writ of Certiorari should be granted.. 41

APPENDIX:

(i) Opinion of Court of Appeals entered June 11, 1987..... 1a

(ii) Opinion of Court of Appeals entered April 27, 1987..... 3a

(iii) Opinion of District Court entered December 15, 1986... 7a

TABLE OF AUTHORITIES

Cases Cited — Page

American Manufacturers Mutual Insurance Co. v. United States, 453 F.2d 1380 (Ct. Cl. 1972)..... 32

Baker v. Carr, 369 U.S. 186 (1962).. 18, 19, 36,40

Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945)..... 30

Cranston v. Reagan, 611 F.Supp. 247 (D.D.C. 1985)..... 36

Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984)..... 19

Da Costa v. Laird, 471 F.2d 1146 (2d Cir. 1973)..... 20

DKT Memorial Fund, Ltd. v. Agency for International Development, 810 F.2d 1236 (D.C. Cir. Feb. 13, 1987).....35-36

Goodwin v. United States, 141 F.Supp. 445 (E.D.N.C. 1956)..... 31

Gray v. United States, 505 F. Supp. 1069 (E.D.N.C. 1981)..... 30

Greenham Women Against Cruise Missiles v. Reagan, 591 F. Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985)..... 20

Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974)..... 19

Cases Cited — Page

Korean Air Lines Disaster, In re, 597 F. Supp. 613 (D.D.C. 1984)..... 20

Langenegger v. United States, 756 F.2d 1565 (Fed. Cir.), cert. denied, __ U.S. __, 106 S.Ct. 78, 88 L.Ed.2d 64 (1985).....23-25 27,33

Moran v. United States, 102 F. Supp. 275 (D.Conn. 1951)..... 31

Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C. Cir. 1986).....22-23 27,33 35

Rappenecker v. United States, 509 F.Supp. 1024 (N.D.Cal. 1980).....-21

Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985)..... 20

T.J. Falgout Boats, Inc. v. United States, 361 F.Supp. 838 (C.D.Cal. 1972), aff'd, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975)..... 30

International Case Cited

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), 1986 I.C.J. 14 (Judgment of

Page

June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986)..... 6,7 26

Statutes and Rules Cited

Federal Tort Claims Act 28 U.S.C. §§ 1346(b) and 2671-2680..... 14, 30,32 32,38, 39

Public Vessels Act 46 U.S.C. §§ 781-790..... 30

Suits in Admiralty Act 46 U.S.C. §§ 741 et seq..... 14, 30,32, 38,39

Supreme Court Rule 17.1(c)..... 15

Executive Orders Cited

Executive Order No. 12,513, 50 Fed. Reg. 18,629 (1985)..... 13

Congressional Record Cited

130 Cong. Rec. H 2558-9 (daily ed. Apr. 11, 1984) (letter from Sen. Goldwater to CIA Director William J. Casey)..... 5

130 Cong. Rec. H 2897 (daily ed. Apr. 12, 1984) (statement of Rep. Leach)..... 12

Page

130 Cong. Rec. H 2918 (daily ed. Apr. 12, 1984) (statement of Rep. Boland)..... 5

130 Cong. Rec. S 3775 (daily ed. Apr. 4, 1984) (statement of Sen. Pell).. 8

130 Cong. Rec. S 4142 (daily ed. Apr. 9, 1984) (statement of Sen. Kennedy)..... 11

130 Cong. Rec. S 4198 (daily ed. Apr. 10, 1984) (statement of Sen. Goldwater)..... 4

130 Cong. Rec. S 4201 (daily ed. Apr. 10, 1984) (statement of Sen. Jepsen)..... 7-8

130 Cong. Rec. S 4204 (daily ed. Apr. 10, 1984) (statement of Sen. Melcher) 12-13

130 Cong. Rec. E 1658-9 (daily ed. Apr. 12, 1984) (statement of Rep. Stokes)..... 9,27

Other Authorities Cited

Note, "The Briar Patch of Reality: A Legal Analysis of the Mining of Nicaragua's Harbors," 18 N.Y.U.J. of Int'l L. & Pol. 169 (1985)..... 10, 11,12

Burns, "Moscow Holds U.S. Responsible for Mines Off Nicaragua's Ports," N.Y. Times, Mar. 22, 1984, at A1, col. 3 9

Page

Butterfield, "Senior Official in CIA is Linked to North's Effort on Contra Arms," N.Y. Times, Jan. 21, 1987, at A1, col. 5..... 38

Gelb, "Officials Say CIA Made Mines with Navy Help", N.Y. Times, June 1, 1984, at A4, col. 3..... 7

E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations", 14 Int'l Law. 297 (Spring 1980).....16,17

Letter to the Editor, N.Y. Times, Sept. 2, 1987 at A26, col. 4..... 40

Schneider, "North's Record: A Wide Role in a Host of Sensitive Projects," N.Y. Times, Jan. 3, 1987, at 1, col. 3..... 5

Smith, "Britain Criticizes Mining of Harbors Around Nicaragua," N.Y. Times, Apr. 7, 1984, at 1, col. 4.. 9

Taubman, "Americans on Ship Said to Supervise Nicaragua Mining," N.Y. Times, Apr. 8, 1984, § 1, at 1, col. 6..... 7

Taubman, "Mine Fields: President's 'Secret War' in Nicaragua Backfires," N.Y. Times, Apr. 15, 1984, § 4, at 1, col. 1..... 8

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, entered on April 27, 1987, not officially reported, is printed in the Appendix (3a). The order of the United States Court of Appeals for the Second Circuit, entered on June 11, 1987, denying Petitioners' petition for rehearing en banc, is printed in the Appendix (1a). The opinion of the United States District Court for the Southern District of New York entered on December 15, 1986, officially reported at 649 F.Supp. 736 (S.D.N.Y. 1986), is printed in the Appendix (7a).

JURISDICTION

The judgment of the Court of Appeals was entered on April 27, 1987 and the order denying the petition for rehearing en banc was entered on June 11, 1987.

The jurisdiction of this Court to review this judgment is invoked pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATEMENT OF THE CASE

Petitioner Chaser Shipping Corporation ("Chaser") is a Liberian Corporation with an office and place of business in Liberia. Chaser is the registered owner of M.T. IVER CHASER, which is managed on Chaser's behalf by Iver Bugge Management A/S, Larvik, Norway. A United States citizen has beneficial ownership in Chaser as do Norwegian citizens.

Petitioner Den Norske Krigsforsikring for Skib, Gjensidig Forening (The Norwegian War Risk Insurance for Ships, A Mutual Association)("Den Norske"), based in Oslo, Norway, insures its members, ship owners and operators, against risk of loss or damage resulting from hostile activities by governments or others. M/T

IVER CHASER is entered with Den Norske. It is standard practice for owners and operators these days to carry war risk insurance whether or not they have specific plans to enter "war zones". This is so, not only because of the owner's own wishes but also because mortgagees of ships require that vessels be fully insured against war risks on a round-the-clock and round-the-globe basis. If a vessel proceeds into designated zones there is an increase in premiums. Nicaraguan waters had not been so designated at the time of the IVER CHASER incident.

These claims against the United States arise as a result of damage suffered by M/T IVER CHASER having on March 28, 1984 come into contact with a mine or mines placed by, or under the direction of, the Central Intelligence Agency ("CIA") in the harbor of Corinto,

Nicaragua. The vessel, enroute from Yuso, South Korea, to Freeport, Texas, with a part cargo of benzene, had called at Corinto to pick up a part cargo of molasses for another U.S. receiver. As a result of the ensuing explosion, M/T IVER CHASER suffered damage amounting to $1,646,905.27, plus interest and costs. The vessel, which carried a crew principally of British subjects, had unloaded no cargo during her Nicaraguan call.

The CIA was involved in the Mining of Nicaraguan Harbors

In late 1983-early 1984, the President of the United States gave authorization to the CIA to see to it that Nicaraguan harbors were mined and gave it operational responsibility therefor. See, e.g., 130 Cong. Rec. S4198 (daily ed. April 10, 1984) (statement of Sen. Goldwater to the effect that CIA Director Casey had confirmed to the Senate Intel-

ligence Committee that the President had approved the mining). See also, April 9, 1984 letter from Sen. Goldwater to CIA Director William J. Casey, reprinted in 130 Cong. Rec. H 2558-9 (daily ed. April 11, 1984).

Recent revelations have established beyond doubt that the mining was planned by staff members (including former NSC staffer Lt. Col. Oliver L. North, CIA staffer Duane R. Clarridge) of the National Security Council, CIA and the military. Schneider, "North's Record: A Wide Role in a Host of Sensitive Projects", N.Y. Times, Jan. 3, 1987, at 1, col. 3.

In January 1984, "contra" spokesmen stated in a sub-rosa local radio broadcast that they had mined Nicaraguan harbors. 130 Cong. Rec. H2918 (daily ed. Apr. 12, 1984) (statement of Rep. Boland). It later turned out that this announcement, which had limited reception, had

been issued pursuant to CIA instructions. Affidavit of Edgar Chamorro, para. 24, filed in the International Court of Justice case brought by Nicaragua and referred to in the Court's opinion, "Military and Paramilitary Activities in and against Nicaragua" (Nicar. v. U.S.), 1986 I.C.J. 14, 46-47, para. 77 (Judgment of June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986) (hereinafter "I.C.J. June 27, 1986 Judgment").

The mines at Corinto were laid in the access channel or in the bay where ships customarily awaited berthing orders. (1986 I.C.J. at 46, para. 76) by CIA employees working from a mother ship off Nicaragua's Pacific Coast, Chamorro Aff., para. 21. The CIA employees supervised the mining and directed Latin Americans ("UCLA's", which means Unilaterally Controlled Latino Assets) who used small highspeed boats. These UCLA's, specially

trained underwater demolition experts, destroyed pipelines and penetrated shipping lanes to place the mines. Taubman, "Americans on Ship Said to Supervise Nicaragua Mining", N.Y. Times, Apr. 8, 1984, § 1, at 1, col. 6; I.C.J. June 27, 1986 Judgment, 1986 I.C.J. at 47, para. 78. American technicians were involved in supervising the mining because relatively advanced equipment was involved: the mines were laid on the sea bed and constructed so as to respond to direct contact, sound waves and water pressure. Taubman, supra, N.Y. Times, Apr. 8, 1984; I.C.J. June 27, 1986 Judgment, 1986 I.C.J. at 46, para. 76. Newspaper sources revealed that the CIA had the assistance of a United States Navy laboratory in constructing the mines. Gelb, "Officials Say CIA Made Mines with Navy Help", N.Y. Times, June 1, 1984, at A4, col.3. See also, 130 Cong. Rec. S4201

(daily ed. April 10, 1984) (statement of Sen. Jepsen who said "U.S. citizens and non-Nicaraguan nationals hired by the CIA appear to be directly involved"); 130 Cong. Rec. S3775 (daily ed. April 4, 1984) (statement of Sen. Pell who commented that " . . . we all know, that those mines originated in the United States").

Between March 1 and March 28, 1984, while IVER CHASER was en route to Corinto, three vessels of non-Nicaraguan registry suffered damage as a result of contact with the mines: they included (1) the GEOPOTES VI (Dutch), damaged March 1, four miles outside Corinto; (2) the LOS CARIBES (Panamanian), damaged March 7, also outside Corinto; and (3) LUGANSK (USSR) damaged March 20, while entering Puerto Sandino. See Taubman, "Mine Fields: President's 'Secret War' in Nicaragua Backfires," N.Y. Times, Apr. 15, 1984, § 4, at 1, col. 1. Protests

by several nations to the United States were unheeded. See Burns, "Moscow Holds U.S. Responsible for Mines Off Nicaragua's Ports", N.Y. Times, March 22, 1984, at A1, col. 3; Smith, "Britain Criticizes Mining of Harbors Around Nicaragua," N.Y. Times, Apr. 7, 1984, at 1, col. 4.

Not until April 1984, did the involvement of the CIA in placing the mines in Nicaraguan ports begin to become known to the general public. See, e.g., 130 Cong. Rec. E 1658 (daily ed. April 12, 1984) (statement of Rep. Stokes who said "Only this week, however, did we learn that the Central Intelligence Agency, CIA, with the consent of the President and Secretaries of State and Defense, had a direct role in the planting of these mines").

The Mining Operations in Nicaragua Were Carried Out in a Manner Contrary to International Law and to Prior Practice of the United States.

The manner in which the Nicaraguan

mining operation was carried out stood in sharp contrast to the way the United States undertook the "quarantine" of Cuban waters in 1962 and the mining of North Vietnamese harbors in 1972, the closest historical precedents.

During the Cuban Missile Crisis of 1962, the United States undertook a "quarantine" of Cuba for the limited purpose of interdicting arms shipments and stopping ships carrying military materiel to Cuba, while permitting other cargoes past the quarantine. The United States publicly declared the quarantine, notified all States that might be affected and advised them of alternative routes; the President also notified the U.N. Security Council of his actions. Note, "The Briar Patch of Reality: A Legal Analysis of the Mining of Nicaragua's Harbors," 18 N.Y.U.J. of Int'l L. & Pol. 169, 216-217 (1985).

The 1972 mining of the North Vietnamese harbors of Hanoi and Haiphong was publicly announced by President Nixon, (Note, supra, 18 N.Y.U.J. of Int'l L. & Pol. at 219); all ships docked were given three daylight periods to leave safely; United States destroyers and gunboats stationed off Vietnam turned away any merchant ship headed for these ports and broadcasted warnings in ten spoken languages and in international signal codes. Id. at 219-220.

In contrast, the Nicaraguan mining operation, insofar as can be ascertained, stopped no arms shipments and was directed indiscriminately against innocent third-parties, such as M/T IVER CHASER, as well as the Nicaraguans. Id. at 217. See also, 130 Cong. Rec. S4142 (daily ed. April 9, 1984) (statement of Sen. Kennedy: "foreign shipping has been totally unaware of the existence of these mines").

Contrary to customary international law, the CIA operatives not only made no efforts to warn merchant ships of the mines in Nicaraguan harbors, but did not follow established procedure with respect to warnings, apparently feeling that the local radio announcements by "contra" spokesmen concerning the mines were all that was required. Note, supra, 18 N.Y.U.J. of Int'l. L. & Pol. at 220-221. But the incident involving M/T IVER CHASER clearly shows that they were wrong. As Representative Leach of Iowa stated, 130 Cong. Rec. H2897 (daily ed. April 12, 1984):

> Analogies to Vietnam are often facile, but as we look at the mining of Haiphong it is interesting to note that the decision was made in an open fashion with full public debate. In the Nicaraguan incident, Lloyds of London received earlier notification than Congress, and those in Congress who were consulted were obligated not only not to tell the public but not to talk with their own colleagues.

See also, 130 Cong. Rec. S4204 (daily ed. April 10, 1984) (statement of Sen.

Melcher: "Not to notify friends and allies is a serious blunder admitted even by many who approve the action").

It should be noted that, at the time IVER CHASER was damaged, not only were the United States and Nicaragua not at war with each other, but there were no economic or trade restrictions.* United States citizens, such as the consignees of the molasses aboard IVER CHASER were free to import goods from Nicaragua. To argue, as does the United States that IVER CHASER under the circumstances of this case assumed the risk of loss from mines is ridiculous, and naive.

The Action Filed by Petitioners

Petitioners filed their Complaint on March 26, 1987, alleging causes of action

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* President Reagan did not institute any economic embargo until 1985. Exec. Order No. 12,513, 50 Fed. Reg. 18,629 (1985).

under the Suits in Admiralty Act, 46 U.S.C. §§ 741 et seq. ("SIAA"), alternatively under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680 ("FTCA"). In May 1986, the United States moved to dismiss the Complaint.

In his December 15, 1986 opinion (7a), District Judge Charles Henry Tenney, without having heard any oral argument, dismissed the Complaint on the ground that it raised a nonjusticiable political question. In its unpublished decision filed April 27, 1987 (3a), the Court of Appeals affirmed. By its order of June 11, 1987 (1a), the Court of Appeals denied the petition for rehearing en banc.

REASON FOR GRANTING THE WRIT

THE LOWER COURTS DESPERATELY NEED GUIDANCE AS TO WHEN IT IS PROPER TO DISMISS AN OTHERWISE JUSTICIABLE CLAIM ON "POLITICAL QUESTION" GROUNDS.

A. This case is one in which the assertion of the "political question" doctrine by the Executive Branch blinded the eyes of the courts below to the fact that no political question is actually involved.

Supreme Court Rule 17.1(c) provides that this Court may exercise its discretion to review on writ of certiorari when ". . . a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." This case fits within both of these criteria. Particularly now, in the light of recent revelations concerning activities of officials in the Executive Branch, it is timely " . . . for the courts to rethink the implications which the poli-

tical question doctrine holds for constitutional government -- and for the place of international law in the American judicial process". E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations", 14 Int'l Law. 297, 329 (Spring 1980).

Petitioners respectfully submit that resort to the political question doctrine has been erroneously used by the lower courts in this instance to avoid adjudicating what otherwise is a quintessentially justiciable dispute. As a result, the political question doctrine has been transmuted from a wholly proper constitutional doctrine of separation of powers into an excuse for automatic refusal to exercise jurisdiction over a claim whenever the Executive Branch waves the banner of "foreign relations". As stated by Professor Gordon in his previously quoted article,

> The political question defense . . . has become a staple of government pleading, a standard piece of its argument whenever governmental or administrative or political expediency counsels against judicial review of an otherwise quintessentially justiciable dispute. That all this proceeds in consequence of a judicial assertion of the dictates of the principle of separation of powers seems especially odd.

Gordon, supra at 329 (footnote omitted; emphasis supplied).

B. This case involves only liability for damages from the grossly negligent manner in which a policy decision was carried out, and does not question the policy decision itself. Therefore the court below erred in affirming its dismissal.

When considering the political question doctrine in the past, this Court identified certain categories of issues that the federal courts should be reluctant to adjudicate out of respect for the separation of powers under the Constitution:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossiblity of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Baker v. Carr, 369 U.S. 186, 217 (1962). The Baker Court, in holding that a "political question" was not involved, also made it clear that courts must decide political question issues on a "case-by-case" basis. Id. at 210-211.

While the Constitution commits to the Executive Branch the authority to make foreign policy decisions, that does not insulate the Executive Branch from all judicial review in the foreign policy area. As the Baker Court specifically

noted: "it is error to suppose that every case or controversy which touches foreign relations lies beyond judicial cognizance." 369 U.S. at 211.

C. A "political question" is raised in cases involving foreign relations only when a plaintiff attacks the rationale behind the foreign policy determination. This is not the case here.

In cases involving foreign relations, the lower courts have held that political questions were raised only when plaintiffs attacked the rationale behind United States foreign policy determinations. See, e.g., Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) (injunctive action by members of Congress concerning the legality of United States presence in, and military assistance to, El Salvador); Holtzman v. Schlesinger, 484 F.2d 1307 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974) (injunctive and

declaratory relief action by members of Congress concerning President's actions with respect to Cambodia); Da Costa v. Laird, 471 F.2d 1146 (2d Cir. 1973) (declaratory relief action concerning mining of North Vietnamese ports and air and naval strikes against North Vietnamese military targets); Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985) (injunctive action against deployment of cruise missiles in England). See also, In re Korean Air Lines Disaster, 597 F.Supp. 613, 616-617 (D.D.C. 1984) (plaintiffs attacked Government's decision not to warn flight that it had strayed into Soviet airspace); Sanchez-Espinoza v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985) (plaintiffs broadly attacked United States aid to Nicaraguan "contras", claiming widespread

attacks on innocent Nicaraguan citizens; District Court opinion did not make it clear whether Complaint contained particularized allegations of injuries; on appeal, Court of Appeals refused to apply the political question doctrine, except to those plaintiffs who were members of Congress); Rappenecker v. United States, 509 F.Supp. 1024, 1028-1030 (N.D. Cal. 1980) (plaintiffs phrased their claim in terms of Government's negligence in undertaking and executing the military rescue operation of S.S. MAYAGUEZ and of failure to warn vessel of danger of capture; thus, they challenged the President's decision-making process with respect to foreign policy and the military).

D. This case, involving only a claim for damages in tort, is well within the traditional bounds of justiciability by the federal judiciary, and well within its areas of expertise.

Courts in the past have generally refused to find political questions present where, as here, a plaintiff raises the narrow issue as to the United States' liability for damages. In Ramirez de Arellano v. Weinberger, 745 F.2d 1500 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), on remand, 788 F.2d 762 (D.C.Cir. 1986), a majority of the United States Court of Appeals for the District of Columbia Circuit (en banc) rejected the Government's political question argument in a suit by one who through Honduran companies owned land in Honduras, which land was confiscated with the aid of U.S. military officers to be used as a Regional Military Training Center. The court found that, rather than challenging

United States foreign policy in Central America, plaintiffs instead sought "adjudication of the narrow issue whether the United States defendants may run military exercises throughout the plaintiffs's private pastures when their land has not been lawfully expropriated." This was a type of dispute historically resolved by the federal courts, well within the traditional bounds of justiciability by the federal Judiciary, and well within its areas of expertise. 745 F.2d at 1512-1513.*

Similarly, in Langenegger v. United States, 756 F.2d 1565 (Fed. Cir.), cert. denied, ___U.S.___, 106 S.Ct. 78, 88

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* This Court's vacation of the Court of Appeals decision on the basis of subsequent legislation concerning the claim, 471 U.S. 1113 (1985), and the Court of Appeals' opinion on remand, 788 F.2d 762 (D.C. Cir. 1986), do not render invalid the Court of Appeals' interpretation of the political question doctrine.

L.Ed.2d 64 (1985), the court rejected the Government's assertion of the political question defense in a suit alleging that the United States was responsible for the planning, implementation and financing of a Salvadoran agrarian reform program that resulted in the confiscation of plaintiffs' property in El Salvador. Because (1) consideration of land taking claims was clearly the role of the judiciary, requiring no movement outside the judiciary's traditional role, (2) the case did not require a judicial determination of El Salvador's sovereignty or the appropriateness of its actions, nor did the case question the Executive's authority to undertake any action, and (3) it was a claim of narrow focus, requiring no second-guessing of the executive branch or detailed inquiry into the ulterior motives of the two governments, the court

reversed a finding by the Court of Claims that the action raised a nonjusticiable political question. The Langenegger plaintiffs had presented a narrow issue: whether the United States' involvement was sufficiently direct and substantial to warrant a holding that, apart from the taking by El Salvador, there was a taking by the United States obligating it to pay "just compensation." 756 F.2d at 1569-1570.*

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* On the merits, the court affirmed dismissal of the plaintiffs' complaint because there was not sufficient and direct United States involvement in the confiscation to trigger the Just Compensation Clause and, alternatively, plaintiffs still had an international forum (arbitration) available and therefore could not show that their remedies had been extinguished in order to permit them to claim expropriation. 756 F.2d at 1571-1573.

E. The gravamen of this action is that the failure of the CIA operatives to insure that proper widespread warnings of the mining were issued was a reckless disregard for the rights of others.

In the instant action, Petitioners do not challenge the United States foreign policy determinations with respect to Nicaragua. Nor do Petitioners contend that it was illegal for the United States to decide to mine Nicaraguan harbors. Rather, Plaintiffs argue that the United States operatives, having mined the harbors pursuant to Presidential authority, violated universally accepted principles of international law and prior practice because they did not issue clear warnings of danger. See I.C.J. June 27, 1986 Judgment, 1986 I.C.J. at 147-148, para. 292(8), at which the court held (14-1) that the failure of the United States to make known the existence and location of the mines laid by it violated customary

international law. See also, 130 Cong. Rec. E1659 (daily ed. April 12, 1984) (statement of Rep. Stokes to the effect that the mining was a clear and outright violation of every basic principle of respect for international law and order).

If the purpose behind these actions had been to disrupt the flow of supplies to Nicaragua, the same could have been achieved through the use of strong warnings alone. Because of the negligent and reckless manner in which the policy was executed, the United States should be held liable for any resulting damages suffered by innocent third-parties, such as Petitioners. See Langenegger, 756 F.2d at 1569-1570; Ramirez de Arellano, 745 F.2d at 1512.

The Court of Appeals erroneously categorized Petitioners' claims as alleging that "the C.I.A.'s operation, which was carried out covertly, should have

been carried out overtly." (5a). Obviously, the mining would have had to be carried out covertly. Rather, it is Petitioners' contention that, once the covert operation of mining the harbors of Nicaragua had been accomplished, the lower echelon Government personnel involved were grossly negligent in that they did not insure that ship owners and operators knew that the harbors had in fact been mined. If proper warning had been given -- as has recently been done by Iran and Iraq with respect to the Persian Gulf -- ship owners and operators could then have made an informed decision whether to avoid those harbors or to use them and thereby run the risk of loss or damage to their vessels. Instead of having the State Department or other appropriate United States Government agency issue an appropriate warning, the lower echelon United States Government

employees concerned simply left it to the "contras", i.e., the Nicaraguan insurgents, to issue warnings of the mining via local radio stations. It is obvious that such an announcement by an insurgent group, if heard at all, might very well be taken as "wishful thinking" by the "contras" and might, therefore, be heavily discounted, if not completely ignored by ship owners contemplating use of Nicaraguan harbors. The failure clearly to warn and not the fact that the mining itself had been done covertly, is the core of Petitioners' case.

F. There is no absence of judicially discoverable and manageable standards for adjudication of this case on the merits.

The nature of Petitioners' claim is such that the federal courts would not be hampered by any absence of judicially discoverable and manageable standards for arriving at an adjudication on the

merits. The federal courts traditionally have handled classic issues of liability for negligence or intentional wrongs when the United States has been sued under the SIAA or FTCA or Public Vessels Act. See, e.g., Canadian Aviator, Ltd. v. United States, 324 U.S. 215 (1945) (naval authorities negligently directed vessel's movements, causing her to strike a submerged wreck); Gray v. United States, 505 F. Supp. 1069 (E.D.N.C. 1981) (allegations under the SIAA that military jet negligently discharged or caused to be discharged military ordnance which struck plaintiff's fishing vessel, causing it to explode and sink; on merits, judgment for United States); T.J. Falgout Boats, Inc. v. United States, 361 F. Supp. 838 (C.D. Cal. 1972), aff'd, 508 F.2d 855 (9th Cir. 1974), cert. denied, 421 U.S. 1000 (1975) (allegations under the SIAA that private vessel was

struck by missile released by United States Navy airplane; recovery not permitted because claim was time-barred); Goodwin v. United States, 141 F. Supp. 445 (E.D.N.C. 1956) (suit under FTCA for loss of fishing vessel and for personal injuries arising when the vessel was struck by a falling practice bomb released from a government airplane; judgment for plaintiff); Moran v. United States, 102 F. Supp. 275 (D. Conn. 1951) (FTCA covered a suit for damages arising when fishing vessel sank as a result of an explosion alleged to have been caused by detonation of an aerial bomb entangled in the vessel's nets and where plaintiff had alleged that the bomb had been deposited in the water by military aircraft during previous experimental and trial bombing runs in the area; court denied

government's motion to dismiss). See also, American Manufacturers Mutual Insurance Co. v. United States, 453 F.2d 1380 (Ct. Cl. 1972), holding that any claim by subrogee of the owner of a ship that had been seized in the Santo Domingo harbor by rebels and had been sunk by the occupying United States Army after the rebels had directed fire upon them arose in tort and was cognizable under either the FTCA or SIAA; the Court of Claims, however, could not transfer the action to the district court because it was time-barred under both statutes.

G. There would be no reason for the trial court to delve into classified and sensitive diplomatic considerations behind the mining.

Consideration of Petitioners' claims would not require the federal courts to delve into classified and sensitive diplomatic considerations behind the mining. In those cases more closely analogous to the instant action, courts have considered and rejected similar arguments by the Government. The Ramirez de Arellano court held that such a concern was premature: if it later turned out that essential evidence was not discoverable due to Executive privilege, the district court could take appropriate action at that time. 745 F.2d at 1513. The Langenegger court held that adjudication of the plaintiffs' claims would not require discussion of sensitive and confidential communications; inquiry into the United States' actions could be

obtained from a review of typical sources such as committee reports, executive messages and other nonsecret documents. 756 F.2d at 1569. Sources of proof other than CIA secret documents exist, public utterances tantamount to admissions by the United States of involvement in the mining.

H. A judicial determination of the merits of these claims would not require the court to monitor the Executive's conduct of foreign relations nor pose a potential for embarrassment from multifarious pronouncements by various departments on one question.

Similarly, a judicial determination of Petitioners' claims would not require judicial monitoring of the Executive's conduct of foreign relations nor risk any potential embarrassment from multifarious pronouncements by various departments on one question. Petitioners have not sought judicial monitoring of foreign policy with respect to Nicaragua, nor does the case raise the specter of judi-

cial control and management of United States foreign policy; as such, the issues in this action are "qualitatively different" from those posed in the cases cited by the United States. Ramirez de Arellano, 745 F.2d at 1513. Adjudication of this case would not compel the federal courts to examine the grounds on which the Executive made the decision to mine Nicaraguan harbors: those grounds are irrelevant to this cause of action. The only issue is whether or not the United States should be obliged to compensate Petitioners under these circumstances for the damages that they suffered by reason of the reckless disregard for the rights of others shown by the manner in which the policy decision was executed. See DKT Memorial Fund, Ltd. v. Agency for International Development, 810 F.2d 1236, 1238 (D.C. Cir. Feb. 13, 1987) ("whereas

attacks on foreign policymaking are nonjusticiable, claims alleging non-compliance with the law are justiciable, even though the limited review that the court undertakes may have an effect on foreign affairs").

Since the Judiciary has been traditionally charged with the task of determining whether the Executive complies with the law when implementing its policy decisions, judicial consideration of this claim would not fail to accord appropriate respect to a coordinate branch of the Government. Cf. Cranston v. Reagan, 611 F.Supp. 247, 253 (D.D.C. 1985) (complaint seeking to compel the United States to set aside nuclear energy agreements with Norway and with Sweden would raise such Baker v. Carr considerations).

I. Compensating innocent third parties for damage was a clearly foreseeable risk of not giving adequate warnings of the mining of Nicaraguan harbors.

Petitioners do not attack the decision of the Executive Branch to conduct mining operations in peacetime. However, having undertaken to mine the Nicaraguan harbors, the United States must now bear responsibility for one of the anticipated costs of implementing such a decision without warnings: the risk of damage resulting therefrom to innocent third-parties. To immunize the United States and force innocent parties to bear the loss under these circumstances would unjustly deprive the latter of valuable rights under law and would create a result that anyone seeing it on the front page of their newspaper would say "That doesn't make sense," as would be the case if a foreign power by placing mines without warning were to cause

injury to Americans, and the Americans not permitted to obtain judicial recovery. Americans reading about that in the newspaper would say that was "barbaric," just as one U.S. Senator described the Nicaraguan mining as "piracy." Butterfield, "Senior Official in CIA is Linked to North's Effort on Contra Arms," N.Y. Times, Jan. 21, 1987, at A1, col. 5.

J. The courts below erroneously extended the "political question" doctrine so as to shield the Government from liability for the very types of claims encompassed in the Suits in Admiralty and Federal Tort Claims Acts.

Petitioner respectfully submit that this case raises an important question of federal law that should not have been dismissed summarily: whether the immunity from judicial review granted to the Executive Branch by the "political question" doctrine was erroneously extended by the court below to shield the Govern-

ment from liability, not only for damages suffered by private interests resulting from the making of Executive decisions, but also for damages resulting from the grossly negligent manner in which those decisions were carried out by lower level Government personnel. By virtue of the decisions below and the summary disposition of this case, the judicial immunity granted by the "political question" doctrine has now, contrary to precedent and the rationale of the Suits in Admiralty and Federal Tort Claims Acts and universal principles of international law, been extended to cover, not only the making of the policy decision, but its faulty execution by lower level Government personnel. If the decision below is allowed to stand, the Executive will enjoy absolute immunity from judicial review for such faulty execution of its foreign policy actions. Surely, such

immunity will encourage insulated and overprotected Executive Branch officials to embark on further "adventures flawed in conception and reckless in practice." See Letter to the Editor, N.Y. Times, Sept. 2, 1987 at A26, col. 4.

The political question doctrine is, at best, a narrow one. As Baker v. Carr admonishes, "[t]he doctrine . . . is one of 'political questions,' not one of 'political cases'." 369 U.S. at 217. Petitioners respectfully submit that the courts below have ignored this admonition and have transformed the doctrine into a wholesale abandonment of the Judiciary's role in determining such cases.

CONCLUSION

For the reason set forth above, this Petition for Writ of Certiorari should be granted.

Dated: New York, New York
September 4, 1987

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eleventh day of June one thousand nine hundred and eighty-seven.

87-6027

CHASER SHIPPING CORPORATION, and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Plaintiffs-Appellants,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiffs-appellants Chaser Shipping Corporation, and Den Norske Krigforsikring for Skib, Gjensidig Forening (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Elaine B. Goldsmith,
Clerk

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 27th day of April one thousand nine hundred and eighty-seven.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE THOMAS J. MESKILL,
HONORABLE J. DANIEL MAHONEY,

Circuit Judges.

----------x

87-6027

CHASER SHIPPING CORPORATION, and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Plaintiffs-Appellants,

- against -

UNITED STATES OF AMERICA,

Defendant-Appellee.

----------x

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. Appellants, claiming that a cargo vessel in which they had interests was damaged by a mine secretly planted in a Nicaraguan harbor by the Central Intelligence Agency, brought suit under the Suits in Admiralty Act and the Federal Torts Claim Act against the United States for damages. The district court dismissed the complaint on the basis that it presented non-justiciable political questions. We agree with the district

court's conclusion that the complaint should be dismissed.

2. Appellants argue that they are not attacking the policy decision of the executive branch to mine the harbors of Nicaragua, but only the allegedly negligent execution of that policy. Appellants' theory is that the C.I.A.'s operation, which was carried out covertly, should have been carried out overtly. But the decision to take covert rather than overt action was itself a policy decision and as such may not be judicially reviewed in the lawsuit appellants have brought.

3. Accordingly, without expressing any views as to other avenues of redress that appellants may have open to them, we affirm the judgment of the district court.

IRVING R. KAUFMAN
Irving R. Kaufman,

THOMAS J. MESKILL
Thomas J. Meskill,

J. DANIEL MAHONEY
J. Daniel Mahoney,
Circuit Judges.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

86 Civ. 2500 (CHT)

OPINION

Chaser Shipping Corporation, and Den Norske Krigsforsikring for Skib, gjensidig forening (The Norwegian War Risk Insurance for Ships, A Mutual Association),

Plaintiffs,

-against-

United States of America,

Defendant.

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TENNEY, J.

The plaintiffs in this action, Chaser Shipping Corporation (herein called "Chaser"), owner of the M/T IVER CHASER, and Den Norske Krigsforsikring for Skib, gjensidig forening (The Norwegian War Risk Insurance for Ships, A Mutual Association) (herein called "Den Norske"), two foreign corporations, seek to recover over $1.6 million in damages from defendant United States of America ("Government"). The injury

for which plaintiffs seek redress occurred on March 28, 1984, in the Nicaraguan harbor of Corinto. The IVER CHASER, loaded with a cargo of molasses and benzine destined for delivery to the State of Texas, struck a mine in the harbor which caused extensive damage to her hull. Complaint, ¶¶ 15, 18. Den Norske paid Chaser for the damage to the ship pursuant to a prior agreement and asserts that it is subrogated to that extent to the rights and claims of Chaser. Complaint, ¶ 4. Plaintiffs' complaint further alleges that the Central Intelligence Agency ("CIA"), with the approval of the President, manufactured the mines and supervised and directed their placement, and that it carried out these acts in a negligent, malicious or wanton manner. Complaint, ¶¶ 8-10. Plaintiffs seek to recover under the Suits in Admiralty Act ("SIAA"), 46 U.S.C. § 742 (1975)

and the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 1346(b) (1976) and §§ 2671-2680 (1965 and Supp. 1986).

The Government moves to dismiss plaintiffs' complaint on three grounds: (i) lack of subject matter jurisdiction; (ii) failure to state a claim upon which relief can be granted; and (iii) improper venue. Fed. R. Civ. P. 12(b)(1), (3) and (6). For the purpose of ruling on the present motion, the Court accepts the truth of the allegations in plaintiffs' complaint that the IVER CHASER was damaged by a mine, which was manufactured or whose placement was supervised and directed, by the CIA with the approval of the President. In addition to the pleadings, the parties have submitted both briefs and affidavits to the Court. Plaintiffs' submission includes various news articles summarizing information known to the public concerning the

placement of mines in Nicaragua's harbors, with particular emphasis on the involvement of the President and the CIA in such operations. These articles state that the White House, CIA and State Department all disclaimed responsibility for the mining in the early months of 1984. Plaintiffs hope to recover their damages on the theory that the Government violated a duty to innocent third-party vessels by failing to comply with its previously established practice of clearly warning such parties that mines had been placed in the harbor. Brief for plaintiffs at 15. The Government contends that the plaintiffs' action raises a nonjusticiable political question, reasoning that the Constitution vests the Executive and Legislative branches with power to conduct foreign relations and thus it would violate the principle of separation of powers "for

this Court to subject the high-level CIA and Presidential activities alleged by Plaintiffs in the complaint to the kind of judicial analysis required for determinations of negligence and proximate causation in tort." Reply Brief for the Government at 2. The Court agrees with the Government that plaintiffs' complaint seeks adjudication of nonjusticiable political questions. Accordingly, the Government's motion is granted and plaintiffs' complaint is dismissed.[1]

DISCUSSION

The undisputed starting point in any court's analysis of a purported political question issue is the Supreme Court's oft-quoted elucidation of that doctrine in Baker v. Carr, 369 U.S. 186 (1962):

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable

and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

Id. at 217.

The Court then proceeded to note that the implication of any one of these concerns in a case would render it nonjusticiable. However, the Court added that it is necessary to make a careful inquiry as to the precise facts and posture of the case at issue before drawing any conclusions as to its justiciability. Id. This Court has conducted such an inquiry and concludes that several of the concerns raised by the Baker opinion will be implicated if the present claim for relief is adjudicated.

The plaintiffs correctly note that the Judiciary is responsible for adjudicating claims of tort liability asserted against the Government. See Greenham Women against Cruise Missiles v. Reagan, 591 F. Supp. 1332, 1336 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir. 1985). However, the Constitution commits to the Executive Branch the authority to make foreign policy decisions. Plaintiffs apparently believe that by framing an action which seeks damages under the FTCA and SIAA, but which does not seek to enjoin or declare unconstitutional the actions of the President or the CIA, they are not asking the Court to interfere in the domain of the Executive Branch. Similar claims of tort liability were asserted against the United States with regard to the events that preceded the shooting down of Korean Air Lines Flight 007 over the Sea of Japan. See

In Re Korean Air Lines Disaster of September 1, 1983, 597 F. Supp. 613 (D.D.C. 1984) (appeal docketed). The plaintiffs in Korean Air Lines alleged that the Government's (i) deployment of military aircraft near Flight 007; (ii) failure to track the flight and (iii) failure to warn the crew of the flight's departure from course constituted tortious conduct. The court dismissed these claims, stating:

> To attempt to decide such a matter without the necessary expertise and in the absence of judicially manageable standards would be to entangle the court in matters constitutionally given to the executive branch.... Whatever the facts and circumstances surrounding the executive decision to conduct reconnaissance activity over the waters adjacent to the Soviet Union, the method and manner of that decision may not be inquired into by the courts.

597 F. Supp. at 616-17.

Here, as in Korean Air Lines, the fact that plaintiffs seek damages and not an injunction does not mitigate

separation of powers concerns. Even though awarding tort damages is a traditional function for the judiciary, it is apparent that there is a clear lack of judicially discoverable and manageable standards for arriving at such an award. The Court simply does not agree with plaintiffs that an inquiry into the issues of tort liability raised by their complaint would be a manageable one. The complaint reveals that this is an action by two foreign entities seeking damages for injuries suffered in foreign waters due to covert mining operations conducted there by the Executive Branch. The precise nature of the claim is that plaintiffs' injuries could have been avoided if the CIA and/or the President had conducted the mining operations with due care. The plaintiffs ask the Court to hold that, once the CIA and/or the President have established a practice

of warning innocent third parties of the possible commencement of covert military operations in an area, an enforceable duty to adhere to such practice arises. Breach of that duty would require the Government to provide monetary redress to innocent third parties injured during the operations. It is apparent that inquiries concerning such alleged breaches could not be conducted without obtaining classified intelligence documents relating to the covert operations. Plaintiffs will be unable to obtain the classified documentary evidence necessary to support their claim as it will certainly not be provided voluntarily and is clearly exempt from disclosure under the Freedom of Information Act, 5 U.S.C. § 552(b)(1)(A) (1977) as secret national defense or foreign policy information. See Peterzell v. CIA, No. 85-2685, slip

op. at 1 (D.D.C. July 11, 1986); Sanchez-Espinoza v. Reagan, 568 F. Supp. 596, 600 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985). Even if plaintiffs were accorded access to intelligence documents concerning the mining of the harbor at Corinto, the Court would be incapable of assessing the underlying military and diplomatic considerations which resulted in the decision to place the mines without warning to innocent third party vessels. Holtzman v. Schlesinger, 484 F.2d 2d 1307, 1310-11 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974); DaCosta v. Laird, 471 F.2d 1146, 1155-56 (2d Cir. 1973).

Furthermore, it cannot be said that the Court, in adjudicating this case, could remain within the traditional realm of the judiciary. As the Supreme Court stated in Chicago & Southern Air

Lines, Inc. v. Waterman Steamship Corp., 333 U.S. 103 (1948):

> [T]he very nature of executive decisions as to foreign policy is political, not judicial. Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex and involve large elements of prophecy. They are and should be undertaken only by those directly responsible to the people whose welfare they advance or imperil. They are decisions of a kind for which the Judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry.

Id. at 111 (citations omitted).

Plaintiffs disingenuously assert that if the Court renders an after-the-fact determination of whether the CIA and the President exercised due care, but refrains from directly enjoining U.S. policy decisions, there will be no judicial monitoring, control or management of U.S. foreign policy towards Nicaragua, but rather, the mere exercise of powers traditionally re-

served to the judiciary. To the contrary, adjudication under the FTCA or SIAA of the claims of liability plaintiffs assert would force the Court to resolve sensitive issues involving the foreign policy conduct of executive branch officials. The occurrence of such an inquiry after the completion of the covert operations in no way minimizes the danger of intrusion into the province of the Executive Branch. For the judiciary to monitor the conduct of covert military operations, whether before or after their occurrence, would be an exercise of nonjudicial discretion which Baker counsels the courts to avoid. See Haig v. Agee, 453 U.S. 280, 292 (1981); Korean Air Lines, 597 F. Supp. at 616. Such scrutiny by the judicial branch would also fail to accord appropriate respect to a coordinate branch of the Government. Id. See also Sanchez-Espinoza,

568 F. Supp. at 600. To avoid becoming embroiled in sensitive foreign policy matters such as this one, the Court declines to interpose its own will above the will of the President or the Congress.[2]

Another concern mentioned in the Baker opinion, the potentiality of embarrassment from multifarious pronouncements by various departments on one question, is also seriously implicated in this case. As the news articles submitted with the plaintiffs' affidavit point out, the White House, the CIA and the State Department all publicly denied that the Government was directly involved in the mining. An inquiry by this Court into these matters, which might result in proving that the prior declarations were erroneous, could indeed be embarrassing to the Government. See Sanchez-Espinoza, 568 F. Supp. at 600. The

Court has no choice but to heed the warning of the D.C. Circuit Court of Appeals in Sanchez-Espinoza concerning the acute "danger of foreign citizens using the courts in situations such as this to obstruct the foreign policy of our government ...." 770 F.2d at 209 (Scalia, J.).

CONCLUSION

In sum, the Court concludes that the plaintiffs' complaint raises a nonjusticiable political question. Thus, it is unnecessary to consider the other grounds raised by the Government in support of its motion to dismiss. Accordingly, the Government's motion is granted and plaintiffs' complaint is dismissed.

So ordered.

Dated: New York, New York
December 11, 1986

CHARLES H. TENNEY
U.S.D.J.

86 Civ. 2500 (CHT)

CHASER SHIPPING CORPORATION,
et ano. v. UNITED STATES

FOOTNOTES

1. The Government asserts two additional grounds for dismissal apart from the political question doctrine: (i) lack of jurisdiction under the FTCA and SIAA, and (ii) improper venue under the FTCA. In view of the Court's conclusion that plaintiffs' complaint raises non-justiciable political questions, it is unnecessary to consider the other grounds raised in support of the motion to dismiss.

2. In Pauling v. McNamara, 331 F.2d 796 (D.C. Cir. 1963), cert. denied, 377 U.S. 933 (1964), a suit which sought to enjoin nuclear testing, then Circuit Judge Warren E. Burger eloquently stated:

That appellants now resort to the courts on a vague and disoriented theory that judicial power can supply a quick and pervasive remedy for one of mankind's great problems is no reason why we as judges should regard ourselves as some kind of Guardian Elders ordained to review the political judgments of elected representatives of the people. In framing policies relating to the great issues of national defense and security, the people are and must be, in a sense, at the mercy of their elected representatives. But the basic and important corollary is that the people may remove their

elected representatives as they cannot dismiss United States Judges. This elementary fact about the nature of our system, which seems to have escaped notice occasionally must make manifest to judges that we are neither gods nor godlike, but judicial officers with narrow and limited authority. Our entire System of Government would suffer incalculable mischief should judges attempt to interpose the judicial will above that of the Congress and President, even were we so bold as to assume that we can make a better decision on such issues.

331 F.2d at 799.

(4)

No. 87-391

Supreme Court, U.S.
FILED
DEC 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION AND DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

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QUESTION PRESENTED

Whether the district court, invoking the political question doctrine, properly dismissed petitioners' suit against the United States to recover for damage caused to a foreign vessel by a mine that allegedly was placed in a harbor in Nicaragua under the supervision of the Central Intelligence Agency.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	12

TABLE OF AUTHORITIES

Cases:

Amerada Hess Shipping Corp. v. *Argentine Republic*, No. 86-7602 (2d Cir. Sept. 11, 1987) 11
Baker v. *Carr*, 369 U.S. 186 (1962) 2, 3, 7, 8, 9-10
Bearce v. *United States*, 614 F.2d 556 (7th Cir.), cert. denied, 449 U.S. 837 (1980) 11
CIA v. *Sims*, 471 U.S. 159 (1985) 8
Chicago & Southern Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 8
De Bardeleben Marine Corp. v. *United States*, 451 F.2d 140 (5th Cir. 1971) 11
Gercey v. *United States*, 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977) 11
Haig v. *Agee*, 453 U.S. 280 (1981) 8
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952) 8
Korean Air Lines Disaster of Sept. 1, 1983, In re, 597 F. Supp. 613 (D.D.C. 1984) 9
Langenegger v. *United States*, 756 F.2d 1565 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985) 9, 10-11
Marbury v. *Madison*, 5 U.S. (1 Cranch) 137 (1803) 7
Nicaragua v. *United States*, 25 I.L.M. 1023 (1986) 6, 9
Ramirez de Arellano v. *Weinberger*, 745 F.2d 1500 (D.C. Cir. 1984), vacated, 471 U.S. 1113 (1985), dismissed as moot, 788 F.2d 762 (D.C. Cir. 1986) 9, 10-11
Snepp v. *United States*, 444 U.S. 507 (1980) 8
United States v. *Curtiss-Wright Export Corp.*, 299 U.S. 304 (1936) 7
United States v. *S.A. Empresa De Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984) 11

Constitution and statutes: Page

U.S. Const. Art. II, § 2 7

Federal Tort Claims Act:
28 U.S.C. 1346(b) 2
28 U.S.C. 2671-2680 2
28 U.S.C. 2680(a) 2, 11

Foreign Assistance and Related Programs Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 1893-1894 9

Foreign Sovereign Immunities Act of 1976:
28 U.S.C. 1330 11
28 U.S.C. 1602 *et seq.* 11

National Security Act of 1947, 50 U.S.C. 403 *et seq.* 8

Suits in Admiralty Act, 46 U.S. 742 2

28 U.S.C. 1350 11

Miscellaneous:

10 Annals of Cong. 613 (1800) 7-8

N.Y. Times, Mar. 22, 1984 ..... 5, 6

In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-391

CHASER SHIPPING CORPORATION AND DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION), PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 3a-6a) is unreported. The opinion of the district court (Pet. App. 7a-24a) is reported at 649 F. Supp. 736.

JURISDICTION

The judgment of the court of appeals was entered on April 27, 1987, and the petition for rehearing was denied on June 11, 1987 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on September 8, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Chaser Shipping, a Liberian corporation, is the owner of the vessel *M/T IVER CHASER*, which was damaged when it allegedly came into contact with a mine

in the harbor of Corinto, Nicaragua, on March 28, 1984. Petitioner Den Norske Krigsforsikring for Skib, Gjensidig Forening (The Norwegian War Risk Insurance for Ships, a Mutual Association) was the war-risk insurer of the vessel. Den Norske paid petitioner Chaser approximately $1.6 million for the damage to the vessel and is subrogated to that extent to the rights and claims of Chaser. Pet. 2-3; Pet. App. 8a-9a.

Petitioners filed this action in the United States District Court for the Southern District of New York under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b), 2671-2680, and the Suits in Admiralty Act (SAA), 46 U.S.C. 742, seeking to recover from the United States for the damage sustained by the *M/T IVER CHASER*. Petitioners alleged that the Central Intelligence Agency (CIA), with the approval of the President, manufactured the mines, supervised and directed their placement in the harbor, and carried out those acts in a negligent or malicious manner. The United States moved to dismiss the complaint on three grounds: (i) that the suit is barred by the political question doctrine; (ii) that the suit cannot in any event be maintained under the FTCA or the SAA because, inter alia, of the discretionary function exception to the FTCA (28 U.S.C. 2680(a)) and parallel principles under the SAA; and (iii) that venue did not lie in the Southern District of New York. Pet. App. 9a-10a.

The district court dismissed the complaint, holding that the suit is barred by the political question doctrine (Pet. App. 7a-24a). The court noted that in *Baker* v. *Carr*, 369 U.S. 186, 217 (1962), this Court had identified a number of concerns that trigger application of the political question doctrine (Pet. App. 12a-13a). The court further noted that several of those concerns, any one of which would render the suit non-justiciable, are present in this case (*id.* at 13a).

The district court concluded, for example, that the concern for the " 'potentiality of embarrassment from multifarious pronouncements by various departments on one question' " is "seriously implicated in this case" (Pet. App. 13a, 21a (quoting 369 U.S. at 217)). Thus, the court observed that "the White House, the CIA and the State Department all publicly denied that the [United States] Government was directly involved in the mining," and that it "could indeed be embarrassing to the Government" if a judicial inquiry called those prior declarations by Executive officials into question (Pet. App. 21a). The court also concluded that this suit would in any event interfere with the conduct of the Nation's foreign relations, which "the Constitution commits to the Executive Branch" (Pet. App. 14a), and that it therefore implicates the Court's concern in *Baker* v. *Carr* regarding judicial involvement where there is " 'a textually demonstrable constitutional commitment of the issue to a coordinate political department' " (Pet. App. 14a, 12a (quoting 369 U.S. at 217)).

In the court's view, it was irrelevant that petitioners did not seek to enjoin the actions of the President and the CIA, but rather sought damages under a theory of tort liability. Even under a tort theory, the court reasoned, there is " 'a lack of judicially discoverable and manageable standards' " for resolving petitioners' claim (Pet. App. 12a-13a, 16a (quoting 369 U.S. at 217)). The court found it significant in this regard that the suit was brought by "two foreign entities seeking damages for injuries suffered in foreign waters due to covert mining operations conducted there by the Executive Branch" (Pet. App. 16a), and that petitioners' theory of liability rests on prior instances in which the United States warned third parties about the possible commencement of military operations which petitioners contend gave rise to an "enforceable duty to adhere to such practice" (*id.* at 16a-17a). The court also found it "apparent that inquiries concerning such alleged breaches could not be conducted without obtaining

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classified intelligence documents relating to the covert operations," yet those documents would be "clearly exempt from disclosure" because they contain "secret national defense or foreign policy information" (*id.* at 17a). Finally, the court explained that "[e]ven if petitioners were accorded access to intelligence documents concerning the mining of the harbor at Corinto, the Court would be incapable of assessing the underlying military and diplomatic considerations which resulted in the decision to place the mines without warning to innocent third party vessels" (*id.* at 18a). See also *id.* at 19a-21a.

2. The court of appeals affirmed in an unpublished order (Pet. App. 3a-6a). The court of appeals rejected the contention that this suit is justiciable because petitioners do not challenge the policy decision to mine the harbors of Nicaragua, only the allegedly negligent execution of that policy. The court reasoned that the basis of petitioners' negligence claim—the CIA's alleged decision to take covert rather than overt action—"was itself a policy decision and as such may not be judicially reviewed in the lawsuit [petitioners] have brought" (*id.* at 5a).

ARGUMENT

The courts below correctly concluded that this suit is barred by the political question doctrine. The court of appeals' brief unpublished order of affirmance does not conflict with any decision of this Court or of another court of appeals and presents no question warranting review by this Court. The petition for a writ of certiorari therefore should be denied.

1. As an initial matter, we note that petitioners' theory for holding the United States liable for the damage to the *IVER CHASER* is extremely attenuated. Petitioners expressly do *not* challenge the alleged decision by the President or the CIA to place mines in the harbors of Nicaragua.

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See Pet. 26, 37.[1] For present purposes, then, it must be assumed that any decision by the United States to assist or participate in the alleged mining was entirely lawful and does not give rise to liability on the part of the United States.

The theory of petitioners' claim instead is that the United States had a duty to warn third party vessels of the presence of the mines. In petitioners' view, that duty arose both as a matter of international law and because the United States made an official public announcement in advance of its quarantine of Cuba in 1962 and its mining of North Vietnamese harbors in 1972. See Pet. 9-13, 26-29, 34-38. The difficulty with this contention is that, as petitioners concede (Pet. 5-6, 8-9, 28-29), the mining of harbors in Nicaragua in fact *was* publicly revealed prior to March 28, 1984, when the *IVER CHASER* was struck. According to the very news reports and other materials upon which petitioners rely, the following events occurred and were publicly reported prior to March 28, 1984: (i) on March 1 and 7, while the *IVER CHASER* was en route to Corinto, two other ships were damaged as a result of contact with mines outside the harbor of Corinto (see Pet. 8); (ii) on March 21, 1984, the Soviet Union attributed responsibility for the mining to the United States and protested to the United States concerning damage caused to a Soviet vessel while entering Puerto Sandino on March 20, 1984 (see Pet. 8-9, citing N.Y. Times, Mar. 22, 1984, at A1, col.3); and (iii) the insurgency forces (the "Contras") had announced, apparently as early as January 1984, that they had placed mines in Nicaraguan harbors (see Pet. 5-6, 28-29).[2]

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[1] Although for present purposes the United States accepts as true the allegations in the complaint, the district court correctly observed that the United States Government has never officially acknowledged its participation, or lack thereof, in the mining. See Pet. App. 10a-11a.

[2] In the March 22, 1984 article in the New York Times cited by petitioners (Pet. 9), the State Department denied United States involvement in the mining but stated that the anti-Sandinista forces previous-

Petitioners acknowledge that the mining was announced by the insurgents, but they nevertheless maintain (Pet. 29) that these announcements were inadequate because they might have been dismissed by shipowners as "wishful thinking." According to petitioners, only an official announcement of the mining by the United States would have sufficed. Thus, the theory of petitioners' suit is that the United States should be held responsible because the shipowner failed to take seriously the announcements that petitioners concede were issued by the insurgency forces.[3] But this theory fails to take account of the incidents involving ships near Corinto on March 1 and 7, before the IVER CHASER arrived; those incidents obviously should have removed any doubts petitioners and others might have had concerning the accuracy of the insurgents' announcements. Moreover, the Casualty Report supplied by the ship's crew (PX 3) states that prior to casting off, the ship was inspected by military divers in order "to ensure there were no mines attached to the ship's hull." Obviously, then, the crew was aware of the danger. In short, petitioners' effort to hold the United States liable for damage to the IVER CHASER resulting from mining is highly tenuous.

2. In any event, the court of appeals correctly affirmed the district court's dismissal of this suit under the political question doctrine. That doctrine rests on the

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ly had announced the mining of harbors in Nicaragua. N.Y. Times, Mar. 22, 1984, at A4, cols. 1-3. On the same date, the Nicaraguan Government announced its intention to obtain minesweepers to clear its harbors of explosive devices. See *id.* at col. 3.

[3] Petitioners rely (Pet. 6) on an affidavit filed in the International Court of Justice in the case of *Nicaragua* v. *United States,* 25 I.L.M. 1023 (1986), which states that the announcement by the insurgency forces concerning the mining was issued pursuant to CIA instructions. Assuming for present purposes that this is accurate, it only undermines petitioners' contention that the United States took no steps to warn third parties of the existence of the mines.

separation of powers under the Constitution (*Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 165-166 (1803); *Baker* v. *Carr*, 369 U.S. at 217) and specifically upon "the relationship between the judiciary and the coordinate branches of the Federal Government" (*Baker* v. *Carr*, 369 U.S. at 210). The various circumstances in which the political question doctrine requires dismissal of a suit were summarized by this Court in *Baker* v. *Carr*, 369 U.S. at 217:

> Prominent on the surface of any case held to involve a political question is found a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it; or the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or an unusual need for unquestioning adherence to a political decision already made; or the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

As the district court held (Pet. App. 13a), a number of these factors are present in this case.

As regards the conduct of foreign policy and national security affairs, there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department" (*Baker* v. *Carr*, 369 U.S. at 217). Under Article II, Section 2 of the Constitution, the President is the Commander in Chief of the Army and Navy, and since the adoption of the Constitution he has been recognized as " 'the sole organ of the nation in its external relations, and its sole representative with foreign nations." ' *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936) (quoting 10 Annals of Cong. 613

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(1800) (remarks of John Marshall)). The commitment of such matters to the President is confirmed by the National Security Act of 1947, 50 U.S.C. 403 *et seq.*, which vests the Executive Branch, including the CIA, with broad authority in matters relating to both foreign intelligence and national security operations. See *CIA* v. *Sims*, 471 U.S. 159, 167, 168-169, 170-173 (1985); *Snepp* v. *United States*, 444 U.S. 507 (1980). Accordingly, matters intimately related to foreign policy and national security are "so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 589 (1952) (footnote omitted); see also *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948). They therefore "are rarely proper subjects for judicial intervention." *Haig* v. *Agee*, 453 U.S. 280, 292 (1981). In this case, an adjudication of petitioners' claim would go to the heart of the formulation, execution, and continuation of an asserted operation that, according to petitioners' own allegations, was approved at the highest levels in the Executive Branch.

There is, moreover, a "lack of judicially discoverable and manageable standards for resolving [petitioners claim]" (*Baker* v. *Carr,* 369 U.S. at 217). See Pet. App. 16a-17a. No satisfactory standard of reasonableness, due care, or duty to warn under principles of tort could be fashioned for a court to review the conduct of an alleged covert insurgency action in the waters off Central America. It would be necessary for the court to determine whether the President or the CIA pursued appropriate policy objectives in designing and carrying out the operation, whether reasonable alternatives were available, and whether the Nation's policy objectives required either the presence of the mines or the alleged involvement by the United States in their placement to remain confidential (or

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at least unconfirmed by the United States itself).[4] And as the district court further recognized, a manageable standard clearly could not be fashioned without obtaining access to sensitive foreign policy and intelligence information in the possession of the Executive Branch. Yet any such information is manifestly privileged from disclosure. *Id.* at 17a.[5] For similar reasons, judicial inquiry into these matters would "express[] lack of the respect due coordinate branches of government" and risk the "potentiality of embarrassment from multifarious pronouncements by various departments on one question" (*Baker* v. *Carr,* 369

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[4] In contending that judicially manageable standards could be developed, petitioners rely (Pet. 30-32) solely on cases in which routine accidents and ordinary negligence in the domestic operation of military equipment gave rise to potential liability on the part of the United States. None of the cases cited by petitioners involves alleged covert operations in a foreign country, such as that at issue here.

[5] In contending that the privileged nature of essential information should not be a bar to suit, petitioners rely (Pet. 33) on *Ramirez de Arellano* v. *Weinberger,* 745 F.2d 1500, 1513 (D.C. Cir. 1984) (en banc), vacated on other grounds, 471 U.S. 1113 (1985), dismissed as moot, 788 F.2d 762 (D.C. Cir. 1986). However, as the subsequent history of the case makes clear, the District of Columbia Circuit's entire discussion of the political question doctrine, including that pertaining to classified information, is no longer binding authority even in the District of Columbia Circuit, because the judgment of the court of appeals was vacated by this Court. Furthermore, in *Ramirez,* the fact of some United States involvement with the training center in Honduras already had been confirmed—and much information concerning that involvement already was a matter of public record—as a result of official pronouncements by the United States Government. See, *e.g.,* Foreign Assistance and Related Programs Appropriations Act, 1985, Pub. L. No. 98-473, 98 Stat. 1893-1894, cited in 471 U.S. at 1113. Similarly, in *Langenegger* v. *United States,* 756 F.2d 1565, 1569 (Fed. Cir.), cert. denied, 474 U.S. 824 (1985), upon which petitioners also rely (Pet. 33-34), the court of appeals concluded that much of the evidence that would be necessary to adjudicate the claim of a taking by the United States in El Salvador already was available from nonsecret sources. Here, by contrast, petitioners would be required

U.S. at 217), because the Executive Branch has officially denied direct involvement by the United States in the mining activities.[6]

Petitioners cannot avoid the political question doctrine by casting their challenge as one based on an alleged violation of a duty to warn, rather than a challenge to the mining itself. The court of appeals correctly rejected that contention, observing that "the decision to take covert rather than overt action was itself a policy decision and as such may not be judicially reviewed in the lawsuit [petitioners] have brought" (Pet. App. 5a). As the cases upon which they rely establish (see Pet. 19-21), the political question doctrine bars judicial inquiry when, as here, the "plaintiffs attack[] the rationale behind United States foreign policy determinations" (Pet. 19). See also *In re Korean Air Lines Disaster of Sept. 1, 1983,* 597 F. Supp. 613, 616-617 (D.D.C. 1984) (barring suit based on alleged failure by the United States to warn an aircraft that it had departed from its course over waters adjacent to the Soviet Union); Pet. App. 15a.[7]

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to seek, through the disclosure of documents by the Executive Branch, an official confirmation of the very fact of the involvement by the United States Government that they allege but that the United States officially denies. It therefore is evident that confidential information is at the core of this case.

[6] The potential for embarrassment from multifarious pronouncements is illustrated by petitioners' reliance (Pet. 6, 26) on the decision of the International Court of Justice in the action brought by Nicaragua against the United States based in part on alleged involvement by the United States in the mining activities. *Nicaragua* v. *United States,* 25 I.L.M. 1023 (1986). The United States, through the Executive Branch, contested that court's jurisdiction over the subject matter and withdrew from the proceedings after the court ruled that it would exercise jurisdiction. See Dept. of State Bull. #2096 (Mar. 1985), at p. 64. Petitioners thus seek to have the courts of the United States adjudicate a controversy that, in the view of the United States, was not properly subject to adjudication by the International Court of Justice.

[7] *Ramirez* and *Langenegger* (discussed at note 5, *supra*), upon which petitioners principally rely (Pet. 22-25, 27, 33, 35) in arguing

3. For the foregoing reasons, the district court correctly dismissed the complaint under the political question doctrine. In any event, the court of appeals' unpublished order affirming that dismissal does not conflict with the decisions of other courts, and it presents no issue warranting review by this Court.[8]

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that the political question doctrine is inapplicable here, were suits brought by United States citizens to recover just compensation from the United States for the alleged taking of their property. Here, by contrast, the suit is brought by foreign corporations, not United States citizens. Moreover, it does not seek to enforce rights conferred by the United States Constitution, but rather seeks to hold the United States liable in tort for actions taken in the implementation of the Nation's foreign policy. Such a suit goes to the very core of the responsibility of the Executive Branch for the conduct of the Nation's foreign affairs and national security.

Petitioners' reliance (Supp. Br. 1-7) on *Amerada Hess Shipping Corp.* v. *Argentine Republic,* No. 86-7602 (2d Cir. Sept. 11, 1987), is also misplaced. *Amerada Hess* is a suit against a *foreign* government, not the United States, and it concerns the scope of a district court's jurisdiction under the Alien Tort Statute, 28 U.S.C. 1350, and the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. 1330, 1602 *et seq.*, statutes that are not at issue in this case.

[8] Even if the political question doctrine were inapplicable, petitioners' suit under the FTCA would be barred by the discretionary function exception, 28 U.S.C. 2680(a), since the manner in which the alleged mining activities of the United States were carried out (including the decision whether to announce or otherwise confirm any involvement by the United States) is clearly committed to Executive discretion. Compare *United States* v. *S.A. Empresa De Viacao Aerea Rio Grandense,* 467 U.S. 797, 807-814 (1984). The SAA also has been construed by some courts to bar recovery based on the performance of discretionary activities. See, *e.g., Bearce* v. *United States,* 614 F.2d 556 (7th Cir.), cert. denied, 449 U.S. 837 (1980); *Gercey* v. *United States,* 540 F.2d 536 (1st Cir. 1976), cert. denied, 430 U.S. 954 (1977); but see *De Bardeleben Marine Corp.* v. *United States,* 451 F.2d 140, 149 (5th Cir. 1971).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1987

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OCTOBER TERM, 1987

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Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF TO GOVERNMENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 10

TABLE OF AUTHORITIES

Cases Cited — PAGE(S)

Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir.), petitions for rehearing denied, Nos. 86-7602, 86-7603 (2d Cir. Nov. 18, 1987) 6, 10

Baker v. Carr, 369 U.S. 186 (1962) 6

International Case Cited

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (Judgment of June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986) 2

Congressional Report Cited

Report of the Congressional Committees Investigating the Iran-Contra Affair, Pub. Nov. 13, 1987, Union Calendar No. 277, 100th Cong., 1st Sess., H. Rep. No. 100-433, S. Rep. No. 100-216 3

PAGE(S)

Other Authorities Cited

E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations," 14 Int'l Law. 297 (Spring 1980) 8

J. Lobel, "The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law," 71 Va. L. Rev. 1071 (Oct. 1985) 6-7, 8, 9

ARGUMENT

The Brief of the United States, at p. 5, correctly states "the theory of petitioners' claim . . . is that the United States had a duty to warn third party vessels of the presence of the mines" and recognizes (p. 4) that petitioners do not challenge the policy decision of the President or the CIA to mine Nicaraguan harbors. By these statements, the United States in effect concedes, despite its phrasing of the "question presented" (p. I), that this case does not involve a political question and that the courts below erred in so holding.

Failure to warn has nothing whatsoever to do with the alleged purpose of the mining: to interdict vessels carrying munitions or other cargo of use to the Nicaraguan Government from entering or leaving Nicaraguan waters. As a matter

of fact, the opposite would have been true: if the United States had issued warnings of mines without actually having laid any mines at all, the vessel traffic to and from Nicaragua would have been effectively stopped without damaging any vessel or risking loss of life. Thus, Petitioners are complaining of the failure of those agents of the Government charged with executing the policy decision to do so properly by issuing warnings, as required by international law, see "Military and Paramilitary Activities in and against Nicaragua" (Nicar. v. U. S.), 1986 I.C.J. 14, 147-148, para. 292(8) (Judgment of June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986), and U. S. precedents, see Petition for Writ of Certiorari at 9-13. This conduct clearly is separate and distinct from the policy itself.

That the Court of Appeals erred grievously in failing to make that distinction is now evident with the publication of the Report of the Congressional Committees Investigating the Iran-Contra Affair, pub. Nov. 13, 1987, Union Calendar No. 277, 100th Congress, 1st Session, H. Rep. No. 100-433, S. Rep. No. 100-216, cited at pages 4 and 5 of the Brief Amicus Curiae of the Norwegian American Chamber of Commerce. The Committees state, at p. 36 of the Report, that the mines were placed at Corinto on a date four weeks before the IVER CHASER was damaged by them. As noted by the Norwegian American Chamber of Commerce in its brief (p. 5), "there would have been plenty of time in which to issue warnings, and if such had been done, the IVER CHASER would not have been damaged."

The United States in its Brief in Opposition appears to argue (p. 5) that even if the United States had issued warn-

ings, such would not have been heeded, inasmuch as the vessel went into Corinto despite mine damage suffered by other vessels in Nicaragua, and an alleged radio warning broadcast by the insurgents. But at the time the IVER CHASER entered Nicaraguan waters, the ship's officers and crew obviously did not know of the existence of the mining; the United States, whose agents failed to issue warnings, cannot be heard to impose an obligation on the vessel to obtain information which was readily available yet not disseminated by the United States and its agents as had been done on previous occasions, and as required under international law. If the United States had issued such warnings, and if the IVER CHASER had ignored them, the situation would have been different. But that is not this case, as Petitioners' pleadings allege, and as Petitioners are prepared to prove.

The United States further appears to argue (Brief, p. 6) that because the crew of the vessel, after loading molasses, was aware of the possible presence of mines, they should not have sailed. Does the United States seriously contend that the vessel should have remained at her loading berth in Corinto until assured by the United States that the mines it had caused to be placed there had been removed?

On p. 3 of its Brief, the Government applauds the concern of the district court as to the "potentiality of embarrassment from multifarious pronouncements by various departments on one question" in this case. That conclusion, however, was reached long before the many pronouncements and revelations made prior to and during the Congressional Iran-Contra hearings. We doubt that District Court Judge Tenney would draw a similar conclusion today!

As for the other criteria discussed in Baker v. Carr, 369 U.S. 186, 217 (1962), in which this Court held that a political question did not there exist, these were all discussed at length at pp. 17-40 of the Petition herein.

In footnote 7 at p. 11 of its Brief, the Government states that Amerada Hess Shipping Corp. v. Argentine Republic, 830 F.2d 421 (2d Cir.), petitions for rehearing denied, Nos. 86-7602, 86-7603 (Nov. 18, 1987), involved a suit in the federal court system against a foreign government, apparently arguing that this makes a difference. While that may have been true in some instances in the past, it should not make a difference today. As stated by Prof. Jules Lobel of the University of Pittsburgh School of Law, in his article, "The Limits of Constitutional Power: Conflicts Between Foreign Policy and International Law," 71 Va. L. Rev.

1071, 1073-74 (1985), "[S]ubjecting violations of international law by foreign governments to federal court review makes it more difficult to justify shielding similar violations by our own government from judicial scrutiny."

Prof. Lobel also urges that the time has come for "reconsideration of the doctrine permitting the President and Congress to supersede treaties or customary international law. This article contends that the executive and the legislature do not have absolute discretion to violate norms of international law in the conduct of foreign policy." Id. at 1075 (footnotes omitted). Petitioners herein are not contesting the President's policy decision to mine Nicaraguan waters, but they do contend that even if presidential policy decisions in the international sphere may be exempt from examination by the courts, that should not pertain to faulty execution

of such policy decisions by governmental agents.

Even if the United States were correct in arguing that this in effect is a public policy issue masquerading as a tort case - which petitioners emphatically deny - this case nevertheless should be reviewed, lest the political question doctrine be transformed into a unilateral exemption from judicial scrutiny of all governmental actions. See Lobel, supra, at 1157: "Blanket deference to executive or congressional actions will signal to the political branches, the public, and future courts that the political branches are subject to no legal restrictions." See also, E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations," 14 Int'l Law. 297, 329 (1980). Petitioners respectfully submit that granting this Petition would deliver the message, to paraphrase

Lobel, supra, at 1179, that if Iran or Chile (or Argentina) has no discretion to commit acts in violation of international law, neither do the agents or employees of the executive branch of the United States Government.

CONCLUSION

For the above reasons, in addition to those set forth in the Petition herein dated September 4, 1987, the Supplemental Brief calling the Court's attention to Amerada Hess Shipping Corp. v. Argentine Republic, and the Briefs Amici of the Center for Constitutional Rights and the Norwegian American Chamber of Commerce, the Petition for a Writ of Certiorari herein should be granted.

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—against—

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Respondent.

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38 pp

TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES ii

PETITIONERS' SUPPLEMENTAL BRIEF . . 1

CONCLUSION 9

APPENDIX: Amerada Hess Shipping Corp. v. Argentine Republic, Nos. 86-7602, 86-7603 (2d Cir. Sept. 11, 1987)

TABLE OF AUTHORITIES

Cases Cited	PAGE(S)
Amerada Hess Shipping Corp. v. Argentine Republic, Nos. 86-7602, 7603 (2d Cir. Sept. 11, 1987) (available Sept. 28, 1987 on LEXIS, Genfed library, USApp file)	passim
Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) . .	6
United States v. Smith, 18 U. S. (5 Wheat.) 153 (1820) .	6
International Case Cited	
Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14 (Judgment of June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986) . .	4
Other Authorities Cited	
Tuchman, "A Nation in Decline?", N. Y. Times, Sept. 20, 1987, § 6 (Magazine) at 52	4, 5

B. Woodward, Veil: The Secret Wars of the CIA 1981-1987 (1987) 8

No. 87-391

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CHASER SHIPPING CORPORATION and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION),

Petitioners,

- against -

UNITED STATES OF AMERICA,

Respondent.

PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners file this Supplemental Brief pursuant to Rule 22.6 of the Rules of this Court for the purpose of calling the Court's attention to a new decision and to other material which was not available at the time of filing the Petition for Certiorari.

On September 11, 1987, the United States Court of Appeals for the Second Circuit reversed the decision of the United States District Court for the Southern District of New York dismissing the complaint of the Liberian owners and charterers of the United States interest Liberian Tanker Hercules against the Argentine Government for damage resulting from the bombing of the vessel during the 1982 Falklands War, in violation of "settled principles of international law." See attached slip opinion in Amerada Hess Shipping Corporation v. Argentine Republic (hereinafter ("Amerada Hess"), Nos. 86-7602, 86-7603,

slip op. at 5168 (2d Cir. Sept. 11, 1987) (available Sept. 28, 1987 on LEXIS, Genfed library, USApp file).

The Iver Chaser case, like Amerada Hess, involves alleged violations of "settled principles of international law" by employees or agents of the respective governments and each involves a claim for a tort only. The international law violations by Argentina are set forth in the September 11th Court of Appeals opinion in Amerada Hess, slip op. at 5168-5170. The international law violations alleged in the Iver Chaser case consist of the failure of agents of the United States, in violation of international law, to give clear warning to the maritime world that Nicaraguan harbors had been

mined.* See pp. 9-13 of the Petition for

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* On June 27, 1986, the International Court of Justice unanimously held the mining itself to be a violation of international law. Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), 1986 I.C.J. 14, 147, Holdings 6 and 7 (Judgment of June 27, 1986). It further held that ". . . the United States of America, by failing to make known the existence and location of the mines laid by it . . . has acted in breach of its obligations under customary international law in this respect." Id. at 147-148, Holding 8. Petitioners, as private parties, are not attacking the policy decision to do the mining: the gravamen of their action is that those who executed the policy decision without giving clear warning of the danger violated "settled principles of international law" and acted in careless disregard for the rights of others - the traditional definition of a tort. As stated by Barbara W. Tuchman in the the New York Times Magazine for Sunday, September 20, 1987: "Lawlessness appears . . . as a twin of incompetence in the Reagan Administration's mining of Nicaraguan waters in 1984, a belligerent act against a country with which we were not and are not at war, ordered by our Government as a whole, not by the outriders of the National Security Council." Tuchman, "A Nation in Decline?", N. Y. Times, Sept. 20, 1987, § 6 (Magazine) at 52, 55. The basis of this law suit, however, is not the Administration's decision to mine, but the negligence of the "outriders" in carrying out that decision.

a Writ of Certiorari filed herein.

Amerada Hess involved the bombing of an innocent neutral ship on the high seas, whereas the Iver Chaser case involves mining damage to an innocent neutral ship caused by representatives of the United States in the waters of a nation with which "we were not and are not at war" (See Barbara W. Tuchman's article cited in the footnote, supra). Surely the rights of innocent parties suffering damage resulting from the negligent acts of representatives of the United States in the territorial waters of a non-belligerent such as Nicaragua should not be different vis-a-vis a non-Nicaraguan tortfeasor than would have been the case if the incident had occurred on the high seas. As stated in Amerada Hess, slip op. at 5169-5170 (citations omitted), "[F]ederal courts have long recognized in a variety of contexts that attacking a

merchant ship without warning . . . on the high seas requires restitution. Similarly, the academic literature on the rights of neutrals is of one voice with regard to a neutral's right of passage." There should be no doubt that damaging a neutral vessel as a result of failure to give adequate notice of mining, either on the high seas or within the territorial waters of a third state, is contrary to the general practice and usage of nations and judicial decisions recognizing and enforcing public international law. See Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980), (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-161 (1820)).

The Amerada Hess court described the bombing of the Hercules by Argentine aircraft and the refusal of Argentina to compensate the neutral vessel as being analogous to piracy. Slip. op. at 5170.

The mining of Nicaraguan waters has similarly been described as "piracy." See Petition herein, p. 38. Surely the willingness of the Court of Appeals for the Second Circuit to have the "piracy" case against Argentina heard in the courts of the United States and its refusal to allow a similar "piracy" case against the United States to be tried constitutes a double standard: the decision in Amerada Hess was correct and the contrary decision in the Iver Chaser case was wrong and should be corrected by reversing the decision below and remanding the case for trial on the merits.

As is clear from their opinions, the courts below erroneously refused in this case to accept that there is a distinction between the covert executive policy decision to mine Nicaraguan harbors (which petitioners do not challenge) and the reckless and negligent manner in

which it was carried out by agents and representatives of the Government. We respectfully submit that there is such a distinction in law and in fact, and that petitioners should have an opportunity to prove their allegations, many of which are the subject of public discussion (see, e.g., B. Woodward, Veil: The Secret Wars of the CIA 1981-1987, 283, 320-325, 337-338 (1987). Reversal for trial of the issue of responsibility of the U.S. government for the tortious acts of its agents and representatives would in no way involve non-justiciable political questions, but would demonstrate to the world the fairness of our judicial system and reconcile the conflict between this case and the Amerada Hess decision.

CONCLUSION

For the reasons set forth above and in the Petition dated September 4, 1987, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
October 2, 1987

Respectfully submitted,

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A P P E N D I X

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 333, 334—August Term 1986

Argued: November 3, 1986
Last supplemental brief filed July 24, 1987
Decided: September 11, 1987

Docket Nos. 86-7602, 7603

AMERADA HESS SHIPPING CORPORATION,

Appellant,

—against—

ARGENTINE REPUBLIC,

Appellee.

UNITED CARRIERS, INC.,

Appellant,

—against—

ARGENTINE REPUBLIC,

Appellee.

Before:

FEINBERG, *Chief Judge*,
OAKES and KEARSE, *Circuit Judges*.

Amerada Hess Shipping Corporation and United Carriers, Inc. appeal decision of United States District Court for the Southern District of New York, Robert L. Carter, J., finding their lawsuit against Republic of Argentina for violating international law barred by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611.

Reversed and remanded. Judge Kearse dissents in a separate opinion.

DOUGLAS R. BURNETT, New York, NY (Hill, Rivkins, Carey, Loesberg, O'Brien & Mulroy, Richard H. Webber, of Counsel), for Appellant Amerada Hess Shipping Corporation; Burke & Parsons, New York, NY (Raymond J. Burke, Jr., Frances C. Peters, of Counsel), *for Appellant United Carriers, Inc.*

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FEINBERG, Chief Judge:

This case presents the important question whether a federal district court has jurisdiction over a claim that a foreign sovereign, in violation of international law, attacked on the high seas a neutral ship engaged in the United States domestic trade. Amerada Hess Shipping Corporation (Amerada) and United Carriers, Inc. (United) appeal from a decision of the United States District Court for the Southern District of New York, Robert L. Carter, J., dismissing their complaint for lack of jurisdiction, 638 F. Supp. 73 (S.D.N.Y. 1986). Appellants argue that both the Alien Tort Statute, 28 U.S.C. § 1350, and the Foreign Sovereign Immunities Act

(FSIA), 28 U.S.C. §§ 1330, 1602-1611, provide jurisdiction over their claims that the Republic of Argentina destroyed an oil tanker on the high seas in violation of international law. We conclude that the Alien Tort Statute does provide jurisdiction and that the FSIA does not bar it. Accordingly, we reverse and remand to the district court.

I. Background

Because the district court dismissed United's complaint for lack of jurisdiction, we must accept appellants' allegations as true. In 1977, Amerada entered a long-term time-charter agreement with United for use of the oil tanker HERCULES. Amerada used HERCULES to carry oil from Alaska, around the southern tip of South America, to its refinery in the United States Virgin Islands. This route took HERCULES near the area in the South Atlantic where, in April 1982, an armed conflict began between Argentina and the United Kingdom that became known in this country as the Falklands War.

On May 25, 1982, HERCULES embarked from the Virgin Islands, without cargo but fully fueled, headed for Alaska. On June 3, in an effort to protect United States interest ships, the United States Maritime Administration telexed to both the United Kingdom and Argentina a list of United States flag vessels and United States interest Liberian tankers (like HERCULES) that would be traversing the South Atlantic, to ensure that these neutral vessels would not be attacked. The list included HERCULES.

By June 8, HERCULES was about 600 nautical miles off the Argentine coast and nearly 500 miles from the

Falkland Islands, in international waters, well outside the "exclusion zones" declared by the warring parties. That afternoon, HERCULES was attacked without warning in three different strikes by Argentine aircraft using bombs and air-to-surface rockets.

Following these attacks, HERCULES, damaged but not destroyed, headed for safe refuge in the port of Rio de Janeiro, Brazil. Although HERCULES arrived safely in Brazil, her deck and hull had both suffered extensive damage, and a bomb that had penetrated her side remained undetonated in one of her tanks. Following an investigation by the Brazilian navy, United determined that it would be unreasonably hazardous to attempt removal of the undetonated bomb. Accordingly, on July 20, 1982, approximately 250 miles off the Brazilian coast, HERCULES was scuttled. United's loss on the sunken ship is claimed at $10,000,000 and Amerada's loss on the fuel that went down with the ship is claimed at $1,901,259.07.

Following a series of unsuccessful attempts to receive a hearing of their claims by the Argentine government or to retain Argentine attorneys to prosecute their claims in the courts of that country, appellants filed their suits in the district court. The district court found that a "foreign state is subject to jurisdiction in the courts of this nation if, and only if, an FSIA exception empowers the court to hear the case." 638 F. Supp. at 75. Concluding that no FSIA exception covered these facts, the district court dismissed the suits for lack of jurisdiction. This consolidated appeal followed.

II. Violation of International Law

The facts alleged by appellants, if proven, would constitute a clear violation of international law. "The law of nations 'may be ascertained by consulting the works of jurists, writing professedly on public law; or by the general usage and practice of nations; or by judicial decisions recognizing and enforcing that law.' " Filartiga v. Pena-Irala, 630 F.2d 876, 880 (2d Cir. 1980) (quoting United States v. Smith, 18 U.S. (5 Wheat.) 153, 160-61 (1820)). Of course, the mere fact that many or even all nations consider an act a violation of their domestic law does not suffice to create a principle of international law. IIT v. Vencap, Ltd., 519 F.2d 1001, 1015 (2d Cir. 1975). "It is only where the nations of the world have demonstrated that the wrong is of mutual, and not merely several, concern, by means of express international accords, that a wrong generally recognized becomes an international law violation." Filartiga, 630 F.2d at 888. In this case, treaties, case law and treatises establish that Argentina's conduct, as alleged by appellants, violates settled principles of international law.

International treaties and conventions dating at least as far back as the last century recognize the right of a neutral ship to free passage on the high seas. Broad international recognition of the rights of neutrals can be found in paragraph 3 of The Declaration of Paris of 1856: "Neutral goods, with the exception of contraband of war, are not liable to capture under enemy's flag."

A more contemporary statement of the international concern and accord on this issue may be found in The Geneva Convention on the High Seas of 1958 (Convention on the High Seas), to which both Argentina and the

United States were signatories. The Convention on the High Seas maps the general usage and practice of nations with regard to the rights of neutral ships in time of war. Article 22 of that treaty states that a warship encountering a foreign merchant vessel on the high seas may not board her without grounds for suspecting her of engaging in piracy, or the slave trade, or traveling under false colors. Even when there are grounds for such suspicion, the proper course is to investigate by sending an officer to inspect the ship's documents or even to board her, not to commence an attack. If such inspection fails to support the suspicions, the merchant vessel shall "be compensated for any loss or damage that may have been sustained." Article 23 of the Convention on the High Seas makes similar provisions for aircraft that have grounds to suspect a neutral vessel. Clearly, Argentina's alleged conduct in this case, bombing HERCULES and refusing compensation, violates the Convention on the High Seas. More recently, the Law of the Sea Convention of 1982 explicitly incorporated these provisions into its text. Argentina is a signatory to the Law of the Sea Convention and the United States has endorsed the relevant sections of it.

Other international accords adopted by the United States supporting a similar view of the rights of neutral ships include The London Naval Conference of 1909, the International Convention Concerning the Rights and Duties of Neutral Powers in Naval War (Hague Convention, 1907) and the Pan-American Convention Relating to Maritime Neutrality of 1928, to which Argentina was a signatory. No agreement has been called to our attention that would cast doubt on this line of authority.

As to "judicial decisions recognizing and enforcing" the rights of neutral ships on the high seas, federal courts

have long recognized in a variety of contexts that attacking a merchant ship without warning or seizing a neutral's goods on the high seas requires restitution. See, e.g., Talbot v. Jansen, 3 U.S. (3 Dall.) 133, 161 (1795); The Lusitania, 251 F. 715, 732-36 (S.D.N.Y. 1918) (dictum); cf. The I'm Alone (Canada v. United States), 3 U.N. Rep. Int. Arb. Awards 1609 (1933). Similarly, the academic literature on the rights of neutrals is of one voice with regard to a neutral's right of passage. See, e.g., Rappaport, "Freedom of the Seas," 2 Encyclopedia of Amer. For. Policy 387 (1978); Restatement of Foreign Relations Law of the United States (Revised) § 521 reporters' note 1, § 522 (Tent. Draft No. 6 1985).

In short, it is beyond controversy that attacking a neutral ship in international waters, without proper cause for suspicion or investigation, violates international law. Indeed, the relative paucity of cases litigating this customary rule of international law underscores the longstanding nature of this aspect of freedom of the high seas. Where the attacker has refused to compensate the neutral, such action is analogous to piracy, one of the earliest recognized violations of international law. See 4 W. Blackstone, Commentaries 68, 72. Argentina has cited no contrary authority. Accordingly, we turn to the jurisdictional ramifications of our holding that appellants have stated a claim of a violation of international law.

III. The Alien Tort Statute

The Alien Tort Statute, 28 U.S.C. § 1350, provides:

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only,

committed in violation of the law of nations or a treaty of the United States.

Although seldom employed, the Alien Tort Statute means what it says. If an alien brings a suit, for a tort only, that sufficiently alleges a violation of the law of nations, then the district court has jurisdiction. See Filartiga, 630 F.2d 876. All of these requirements are met in the instant case. Appellants are aliens; they are Liberian corporations. This suit is for a tort only—the bombing of a ship without justification. Also, as discussed above, the suit alleges a violation of international law.

Argentina argues, however, that the Alien Tort Statute provides jurisdiction only over individuals, not over sovereign states. It claims that the United States recognized absolute sovereign immunity in 1789, when Congress enacted the Alien Tort Statute. Therefore, Argentina contends, if Congress had intended to provide jurisdiction over sovereigns, it would have done so explicitly.

As a preliminary matter, it may be—at least as to loss of a vessel under the circumstances alleged here—that absolute sovereign immunity did not govern when the Alien Tort Statute was enacted. Rather, courts considered the immunity that was granted to be merely "a matter of grace and comity on the part of the United States." Verlinden v. Central Bank of Nigeria, 461 U.S. 480, 486 (1983). It was recognized that the United States had the power to exercise jurisdiction over a foreign sovereign, if it saw fit to do so. See The Schooner Exchange v. M'Faddon, 11 U.S. (7 Cranch) 116, 146 (1812). Thus, for example, if a foreign sovereign seized a vessel at sea in violation of the law of nations, "the prize property which [the vessel] brings into our ports is liable to the jurisdiction of our Courts," notwithstanding any claim of sover-

eign immunity. The Santissima Trinidad, 20 U.S. (7 Wheat.) 283, 354 (1822). See also The Prins Frederik, 2 Dods. 451 (1820) (English case), in which the court indicated that it would have jurisdiction over a foreign sovereign that had violated the law of salvage, if the sovereign did not make "recompense" on its own.

We need not decide, however, whether a court faced with the circumstances of this case in 1789, the year the Alien Tort Statute was enacted, would have exercised jurisdiction over a foreign sovereign. In construing the Alien Tort Statute, "courts must interpret international law not as it was in 1789, but as it has evolved and exists among the nations of the world today." Filartiga, 630 F.2d at 881. The Alien Tort Statute is no more than a jurisdictional grant based on international law. The evolving standards of international law govern who is within the statute's jurisdictional grant as clearly as they govern what conduct creates jurisdiction. Cf. Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 457 (1964) (White, J., dissenting) (under Act of State doctrine, "reasons for nonreview . . . lose much of their force when the foreign act of state is shown to be a violation of international law").

Thus, we must look to modern international law to decide whether the statute provides jurisdiction over a foreign sovereign. For example, if a current norm of international law immunized sovereigns for behavior that, if committed by an individual, would be a violation of international law, such an action by a sovereign would not be a tort "committed in violation of the law of nations." The modern view, however, is that sovereigns are not immune from suit for their violations of interna-

tional law.[1] See Paust, Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine, 23 Va. J. Int'l L. 191, 221-32 (1983); Bazyler, Litigating the International Law of Human Rights: A "How To" Approach, 7 Whittier L. Rev. 713, 733-34 (1985).

That international law currently denies immunity for violations of international law is not surprising, when one considers that international law consists primarily of rules guiding the conduct of nations. If sovereign acts were immunized today from scrutiny under international law, the exception would nearly swallow the rule. For example, the emerging international law prohibition of genocide, see D'Amato, The Concept of Human Rights in International Law, 82 Colum. L. Rev. 1110, 1127-29 (1982), would make little sense, even in theory, if sovereign states were not covered by the prohibition. Indeed, the sovereign immunity defense raised by Nazi war criminals at the Nuremberg trials was rejected by the international tribunal. International Military Tribunal (Nuremberg), Judgment and Sentences (1946), reprinted in 41 Am. J. Int'l L. 172, 221 (1947). ("The principle of international law, which under certain circumstances, protects the representatives of a state, cannot be applied to acts which are condemned as criminal by international law."). Since the sinking of a neutral vessel on the high seas without justification violates a substantive principle of international law, no matter who does the sinking, there is no immunity under international law in this case.

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1 After argument, the panel requested and received supplemental briefs on this issue.

We hold, therefore, that the Alien Tort Statute provides jurisdiction over Argentina.

IV. The FSIA

Argentina also contends that, regardless of whether the Alien Tort Statute would provide jurisdiction, the FSIA is now the exclusive basis for obtaining jurisdiction over foreign sovereigns. We undertake our review of the FSIA mindful of the tenet of statutory construction that "[w]here fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law." Restatement of Foreign Relations Law of the United States (Revised) § 134 (Tent. Draft No. 6, 1985). See The Charming Betsy, 6 U.S. (2 Cranch) 137, 143 (1804). Since international law would deny immunity in these circumstances, we would construe the FSIA to grant immunity only if Congress clearly expressed such an intent.

In support of its view that the FSIA preempts the jurisdictional grant of the Alien Tort Statute, Argentina points to the apparently comprehensive language of this court in O'Connell Machinery Co. v. M.V. "Americana", 734 F.2d 115 (2d Cir.), cert. denied, 496 U.S. 1086 (1984): "The Foreign Sovereign Immunities Act insulates foreign states from the exercise of federal jurisdiction, except under the conditions specified in the Act." Id. at 116. The Supreme Court has expressed similar views. See Verlinden, 461 U.S. at 496-97 (1983). The view of the FSIA as the sole basis for United States jurisdiction over foreign sovereigns can be traced to the statute's legislative history. For example, the House Report explains that the FSIA "sets forth the sole and exclusive standards to be used in

resolving questions of sovereign immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S. Code Cong. & Admin. News 6604, 6610 (House Report). This authority accurately states the general rule. As discussed below, however, Congress was not focusing on violations of international law when it enacted the FSIA. Therefore, we do not believe these pronouncements were intended to cover all violations of international law in general and actions under the Alien Tort Statute in particular.

A close examination of the legislative history of the FSIA demonstrates that Congress did not intend to remove existing remedies in United States courts for violations of international law of the kind presented here. Congress sought to achieve three major goals through the FSIA. First, it intended to incorporate into United States law the "restrictive" theory of sovereign immunity in accordance with international law (no immunity for "commercial or private" sovereign acts). Second, it sought to make certain that the judicial rather than the executive branch would apply the law, so "that these often crucial decisions are made on purely legal grounds and under procedures that insure due process." House Report at 6606. Third, it hoped to eliminate many of the procedural problems that suits against foreign sovereigns create (e.g. service of process, execution of judgment) by providing comprehensive rules for these aspects of a suit. See House Report at 6605-06. None of these goals suggests that Congress intended to eliminate the jurisdictional grant of the Alien Tort Statute for violations of international law.

The FSIA's focus on commercial concerns pervades the entire statute. The impetus for the enactment of the FSIA

was Congress' awareness that the increased commercial interaction of foreign states with United States citizens "call[s] into question whether our citizens will have access to the courts in order to resolve ordinary legal disputes." House Report at 6605. Thus, the act adopted a theory of immunity whose focus is limited to commercial situations, and the non-consensual exceptions to sovereign immunity that it supplies are almost exclusively restricted to commercial activities as well. (The one major exception is section 1605(a)(5), which deals with private torts). International law violations are simply not discussed in the statute or the legislative history outside of the commercial context. Thus, international law violations were not the focus of the "comprehensive" language of the drafters of the FSIA anymore than they were the focus of the Supreme Court in the *Verlinden* case, 461 U.S. 480. We would consider it odd to hold that, by enacting a statute designed to narrow the scope of sovereign immunity in the commercial context, Congress, though silent on the subject, intended to broaden the scope of sovereign immunity for violations of international law.

The other goals of the FSIA, to place immunity decisions firmly in the courts, and to codify procedures for suits against sovereigns, do not suggest an intent to provide immunity for violations of international law outside of the commercial context. Prior to the FSIA, a foreign sovereign would frequently obtain immunity by seeking the intervention of the United States State Department. This left the State Department in an awkward position and parties dealing with foreign governments in an uncertain one. Id. at 6607. At the same time, the United States found that "[i]n virtually every country . . . sovereign immunity is a question of international

law to be determined by the courts." Id. at 6608. Requests by the United States for immunity in foreign courts frequently failed. Id. at 6607. Accordingly, through the FSIA, Congress made immunity decisions the exclusive province of the courts. This provided certainty to parties coming into contact with foreign sovereigns and brought United States practice into conformity with the immunity practices of most other nations. The elimination of the executive branch's role in making immunity decisions certainly does not suggest an intent to provide immunity for violations of international law. Similarly, the procedural goals of the FSIA in no way require an implicit repeal of the jurisdictional grant of the Alien Tort Act; these procedural rules would simply apply to a suit under that statute as well.

Not only is the legislative history of the FSIA devoid of any indication that Congress intended the FSIA to bar jurisdiction under the unusual circumstances of this case, a suit under the Alien Tort Act for a violation of international law, but, in our view, construing the FSIA to require that result would actually frustrate Congress' purpose. The "central premise" of the FSIA was that "decisions on claims by foreign states to sovereign immunity are best made by the judiciary on the basis of a statutory regime which *incorporates standards recognized under international law*." House Report at 6613 (emphasis added). Thus, although Congress did not focus on suits for violations of international law, it clearly expected courts to apply the international law of sovereign immunity. As we have seen, under international law, Argentina would not be granted sovereign immunity in this case. Therefore, a grant of immunity here would fly in the face of this central premise. Since Congress did not

express a clear intent to contradict the immunity rules of international law, and, indeed, left the Alien Tort Statute in force, we conclude that the FSIA does not preempt the jurisdictional grant of the Alien Tort Statute.

V. Personal Jurisdiction

Of course, even given the jurisdictional grant of the Alien Tort Statute, the district court must have constitutionally satisfactory personal jurisdiction over the defendant. Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 313 (2d Cir. 1981), cert. denied, 454 U.S. 1148 (1982). Under International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945), a nonresident defendant must have sufficient contacts with the forum, so that the exercise of jurisdiction will not offend notions of fair play and substantial justice. In the international context, the "forum" that the contacts must relate to is the United States itself. See Texas Trading & Milling Corp., 647 F.2d at 314. Thus, we must examine the extent:

> to which defendants availed themselves of the privileges of American law, the extent to which litigation in the United States would be foreseeable to them, the inconvenience to defendants of litigating in the United States, and the countervailing interest of the United States in hearing the suit.

Id. (citations omitted). See Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 Stan. L. Rev. 385, 404-407 (1982).

In this case, we find that the constitutional requirements for personal jurisdiction are satisfied. We note at the outset that certain universal offenses, like piracy and

genocide are offenses against the law of nations wherever they occur. See Restatement of Foreign Relations Law of the United States (Revised) § 404 (Tent. Draft No. 6, 1985). The allegations here probably fall within this class of offense. Since, under international law, a state may punish these offenses even when they occur outside the state's territory, it has been argued that such occurrences always have sufficient "effects" within the United States to satisfy due process. See Paust, Draft Brief Concerning Claims to Sovereign Immunity and Human Rights: Non-immunity for Violations of International Law under the FSIA, 8 Hous. J. of Int'l L. 49, 69-70 (1985).

We need not decide that question in this case, however, since the actions alleged here are sufficiently related to the United States for Argentina to have been on notice that it might be sued here. Argentina was specifically notified by the United States that HERCULES would be passing through the South Atlantic on neutral business, clearly revealing to Argentina a United States interest in the ship and its safety. Furthermore, HERCULES was plying the United States domestic trade, transporting oil from one part of the United States to another part of the United States pursuant to a contract that called for payment in the United States. Of course Argentina was also aware of the obvious United States interest in protecting the freedom of the high seas.

Argentina, as a member of the community of nations, has naturally benefited from the freedom of the seas guaranteed by international law and the law of the United States. Obviously, Argentina has ready means to defend the suit here, and, if the United States declines to exercise personal jurisdiction, the substantive policies of the international law involved will be undermined. Considerations

of fairness also weigh in favor of exercising jurisdiction since appellants have sought redress of their grievances in Argentina and were unable to obtain even a hearing. See World-Wide Volkswagon Corp. v. Woodson, 444 U.S. 286, 292 (1980). Accordingly, we find that there is no constitutional bar to the district court's exercise of personal jurisdiction over Argentina here.

VI. Conclusion

Our holding today is a narrow one. The FSIA is the sole source from which a foreign sovereign may obtain immunity and, ordinarily, it is the only basis on which a court can exercise jurisdiction over a foreign sovereign. However, where an alien sues a foreign sovereign for a violation of international law, Congress has provided subject matter jurisdiction under the Alien Tort Statute. We realize that the question of the effect of these two statutes enacted by Congress is a difficult one.[2] We are heartened by the knowledge that, if we are mistaken, there is no bar to a statutory remedy. It should also be noted that the burden on a plaintiff moving under the Alien Tort Statute remains great. The class of actions that are recognized as international law violations, as distin-

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2 Other district courts that have directly considered these questions have reached varying conclusions. See Von Dardel v. Union of Soviet Socialist Republics, 623 F. Supp. 246 (D.D.C. 1985) (finding jurisdiction); In re Korean Airlines Disaster of September 1, 1983), MDL No. 565, Misc. No. 83-0345 (D.D.C. Aug. 2, 1985) (finding no jurisdiction); Siderman v. The Republic of Argentina, (CV82-1772-RMT MCX)) (C.D. Cal. March 7, 1985) (finding no jurisdiction). We are informed that further proceedings are pending in *Von Dardel* and *Siderman*. Cf. Tel-Oren v. Libyan Arab Republic, 726 F.2d 774 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985).

guished from a mere tort, is quite small. Moreover, the sovereign defendant or its action must have sufficient contacts to satisfy the constitutional requirements of personal jurisdiction. And finally, the procedural requirements of the FSIA, restricting execution of judgment for example, see Letelier v. Republic of Chile, 748 F.2d 790 (2d Cir. 1984), cert. denied, 471 U.S. 1125 (1985) would still have to be considered. See Kane, Suing Foreign Sovereigns: A Procedural Compass, 34 Stan. L. Rev. 385, 392-93 (1985).

The judgment of the district court is reversed and the case is remanded for further proceedings.[3]

KEARSE, *Circuit Judge*, dissenting:

I respectfully dissent from the majority's conclusion that the district court has subject matter jurisdiction over the present suit to recover money damages from defendant Argentine Republic ("Argentina") for its bombing of a Liberian tanker in international waters some 600 miles from the Argentine coast. In my view, the majority has disregarded a clear Congressional intention to deny United States courts jurisdiction over such matters where,

3 Appellants also argue that jurisdiction exists here under § 1605(a)(5) of the FSIA on the grounds that sinking a ship on the high seas is a tort "within the United States" and that disruption of contractual payments due in New York is an "injury occurring in the United States." See Texas Trading & Milling Corp., 647 F.2d at 312. In view of our disposition of this case, we need not consider these issues. We do note, however, that these arguments are not inconsistent with our holding, since a court could find jurisdiction for a tort under the FSIA, without deciding whether the tort is a violation of international law.

as here, the foreign state asserts a defense of sovereign immunity.

The majority holds that Argentina is not entitled to recognition of its claim of sovereign immunity, and thereby to have the case dismissed for lack of jurisdiction, because the Alien Tort Statute, codified at 28 U.S.C. § 1350 (1982), provides that "[t]he district courts shall have original jurisdiction of any civil action by an alien for a tort . . . committed in violation of the law of nations . . . ." The majority views this provision as "no more than a jurisdictional grant based on international law," and rules that the scope of the grant depends on "[t]he evolving standards of international law." *Ante* at [10]. I disagree.

At the outset, it should be recognized that though substantive international law is part of the common law of the United States, *see Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980), federal court subject-matter jurisdiction is not a matter of common law. Such jurisdiction exists only to the extent that Congress has bestowed it, "in the exact degrees and character which to Congress may seem proper for the public good." *Cary v. Curtis*, 44 U.S. (3 How.) 236, 245 (1845) (footnote omitted); *Sheldon v. Sill*, 49 U.S. (8 How.) 441 (1850). Thus, even assuming that when Congress passed the Alien Tort Statute in 1789 it intended to allow federal subject-matter jurisdiction to ebb and flow with the vicissitudes of "evolving standards of international law," a premise of which I am skeptical, I cannot see how we can properly disregard the clearly restrictive provisions of the Foreign Sovereign Immunities Act ("FSIA") passed in 1976, codified at 28 U.S.C. §§ 1330, 1602-1611 (1982), which were "intended to preempt any other State or Federal law

(excluding applicable international agreements) for according immunity to foreign sovereigns." H.R. Rep. No. 1487, 94th Cong., 2d Sess. ("House Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News ("USCCAN") 6604, 6610.

Section 1602 of the FSIA provides that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter [*i.e.*, 28 U.S.C. §§ 1602-1611]." To me, the plain language of this provision means that the FSIA established the exclusive framework within which the courts of the United States were, from 1976 onward, to rule on foreign states' claims of sovereign immunity.

If further clarification be required, the legislative history of the FSIA is replete with it. For example, the Report of the House of Representatives Judiciary Committee, in addition to stating that the FSIA was intended to preempt any other law with regard to foreign sovereign immunity, stated that the FSIA "sets forth the *sole and exclusive standards* to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States." House Report, 1976 USCCAN at 6610 (emphasis added). *See also id.* at 6604 (FSIA's purpose was "to define the jurisdiction of United States courts in suits against foreign states [and] the circumstances in which foreign states are immune from suit"); *id.* (FSIA was designed "to provide when a foreign state is entitled to sovereign immunity"); *id.* at 6613 (FSIA "sets forth the legal standards under which Federal and State courts would henceforth determine all claims of sovereign immunity raised by foreign states"); *id.* at 6610 ("setting forth comprehensive rules

governing sovereign immunity, the [FSIA] bill prescribes: the jurisdiction of U.S. district courts in cases involving foreign states . . ."); *id.* at 6611 (the bill added 28 U.S.C. § 1330, which "provides a comprehensive jurisdictional scheme in cases involving foreign states").

It is hardly surprising, therefore, that the United States Supreme Court has noted that the FSIA "contains a comprehensive set of legal standards governing claims of immunity in every civil action against a foreign state." *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 488 (1983) ("*Verlinden*").

Looking to the substantive provisions of the FSIA, I see no basis for denying Argentina's claim of sovereign immunity in the present case. Section 1604 states, in pertinent part, that "a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter." 28 U.S.C. § 1604. Thus, the FSIA "starts from a premise of immunity and then creates exceptions to the general principle." House Report, 1976 USCCAN at 6616. "[I]f the claim does not fall within one of the exceptions, federal courts lack subject-matter jurisdiction." *Verlinden*, 461 U.S. at 489 (footnote omitted). The exceptions created in §§ 1605-1607 center principally on the foreign state's conduct of commercial activities, plainly not at issue in the present case, and on noncommercial torts committed within the United States (*see* House Report, 1976 USCCAN at 6619: "the tortious act or omission must occur within the jurisdiction of the United States . . ."), a condition also plainly not met here.

Finally, it is evident that in enacting the FSIA, Congress did consider and make provision with respect to

claims of alleged violations of international law. Thus, the House Report noted that in only "two categories of cases [would § 1605(a)(3)] deny immunity where 'rights in property taken in violation of international law are in issue.' " House Report, 1976 USCCAN at 6618. The two categories involve cases where the property (or property exchanged for it) either (a) is present in the United States, or (b) is owned or operated by the foreign state claiming immunity. 28 U.S.C. § 1605(a)(3). Neither circumstance is present here.

In sum, I believe it clear from both the statutory language and the legislative history that (1) the FSIA provides the exclusive framework within which the courts of the United States are to resolve a foreign state's claim of sovereign immunity, and (2) within that framework, recognition of such immunity is to be the rule, subject only to such exceptions as are expressly provided in the statute. Since the FSIA does not set forth any exception denying immunity in a case such as the present one, I would affirm the judgment of the district court dismissing this action.

Supreme Court, U.S.
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No. 87-391

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHASER SHIPPING CORPORATION and DEN NORSKE KRIGSFORSIKRING FOR SKIB, GJENSIDIG FORENING (THE NORWEGIAN WAR RISK INSURANCE FOR SHIPS, A MUTUAL ASSOCIATION),

Petitioners,

—against—

UNITED STATES OF AMERICA,

Respondent.

BRIEF AMICUS CURIAE OF THE CENTER FOR CONSTITUTIONAL RIGHTS IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NO. 87-391

IN THE
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CONSENT OF PARTIES

Amicus Curiae has filed this brief with the consent of Appellants and Appellees. Letters of consent have been filed with the Clerk of the Court.

Interest of Amicus

Amicus is a public interest law firm which has, for the past twenty years, sought to advance, through litigation and education, the twin causes of constitutional and international law.

To this end, it has, inter alia, represented members of Congress and religious and civic groups in cases involving separation of powers questions concerning foreign affairs, as well as the duty of the executive and legislative branches to observe, and of the courts to enforce, international law in the conduct of foreign affairs.

Several of these cases have been cited in the pleadings and decisions below, i.e., Crockett v. Reagan, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984); Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984), aff'd, 755 F.2d 34 (2d Cir.

1985); and Sanchez-Espinosa v. Reagan, 568 F.Supp. 596 (D.D.C. 1983), aff'd on other grounds, 770 F.2d 202 (D.C. Cir. 1985).

Amicus has a constituency of thousands of lawyers, law professors, individuals and organizations throughout the country, who look to it to conduct litigation in matters "touching foreign affairs," to consult with it in litigation which they may bring, and to provide continuing guidance in this area of ever increasing importance in our national life.

Amicus fully agrees with petitioners' claim that "the lower courts desperately need guidance as to when it is proper to dismiss an otherwise justiciable claim on 'political question' grounds."

For these reasons, Amicus submits the attached brief urging that this

Court review the decision of the Court of Appeals for the Second Circuit.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT.	1
ARGUMENT	
I. THIS COURT MUST DECIDE WHETHER THE POLITICAL QUESTION DOCTRINE WARRANTS DISMISSAL WHERE THE ACT IMPUGNED, ALBEIT THE RESULT OF EXECUTIVE POLICY, IS ALLEGED TO BE CLEARLY ILLEGAL.	2
II. FOR PURPOSES OF THE MOTION TO DISMISS, THE COURTS BELOW HAD TO ACCEPT PLAINTIFF'S ALLEGATION THAT DEFENDANTS' ACTIONS WERE CLEARLY ILLEGAL	
1. The Failure of the United States to Provide Adequate Warning of the Mining Constituted Gross Negligence Under Domestic Tort Law. . .	7
2. The Failure to Provide Adequate Warning of the Mining Was In Clear Violation of International Law. . .	9

3. The Mining Operation Itself - Apart From the Failure to Warn - Was In Violation of International Law. . . 11

4. Neither the President Nor the Courts May Turn A Cold Shoulder to International Law. . . 13

III. CONCLUSION 16

TABLE OF AUTHORITIES

Page

Baker v. Carr, 369 U.S. 186,217 (1962). 11

Corfu Channel Case, 1949 I.C.J. Reports 4. 9

Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) 11

Finzer v. Barru, 798 F. 2d 1450, 1458 (D.C. Cir. 1986) 21

Goldwater v. Carter, 444 U.S. 996 (1979) 12

Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984), aff'd,755 F. 2d 34 (2d. Cir. 1985) 12

Hilton v. Guyot, 159 U.S. 113, 163 (1895) 20

Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, (1803) 8
10

Military and Paramilitary Activities in and against Nicaragua, 1986 I.C.J. 14, par. 292(8). 10

Moenck v. U.S, 264 F. Supp. 615 (D.C. Iowa 1966) 15

Occidental of Umm v. A Certain Cargo 577 F.2d 1196,1204 (5th Cir. 1978). 20

Sanchez-Espinosa v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985) 13

Tel-Oren v. Libyan Arab Republic, 726 F.2d 774,798 (D.C. Cir. 1984), cert. denied, 470 U.S. 1003 (1985) 12
13

Williams v. U.S, 352 F. 2d 477 (5th Cir. 1965) 15

Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646, (1952) 10

Statutes

28 U.S.C. Sec. 2674. 8

Miscellaneous

130 Cong. Rec. §4140 (daily ed. April 9, 1984),. 9

1986 I.C.J. 14 (1986), par. 292 (6) 12

Art. 2(4) of the United Nations Charter, ... 12

Charter of the Organization of American States, 2 U.S.T,. 12

Convention on Rights and Duties of States, 49 Stat. 3097 12

Henkin, Is there A 'Political Question' Doctrine?, 85 Yale L.J. 597, 622-23 (1976). 5

Note, The Briar Patch of Reality A Legal Analysis of the Mining of Nicaragua's Harbors, 18 N.Y.U.J. of Int'l. Pol. 169, 220 (1985). 9

U.S.-Nicaragua Treaty of Friendship 12

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

The decisions below are a classic example of the tendency of some, but by no means all, judges to avoid the duty laid upon them by Chief Justice Marshall "to say what the law is," Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177, (1803), for reasons having nothing to do with the law itself. Amicus will argue that, where a genuine legal question is duly presented to a court of competent jurisdiction by a party having standing, it must entertain the question presented, whether or not the underlying facts involve a policy decision by the executive. Thus, the validity of a political question dismissal is inextricable from the presence vel non of a genuine issue of law.

The second part of the argument will show that a genuine issue of law is present in this particular case.

ARGUMENT

I. THIS COURT MUST DECIDE WHETHER THE POLITICAL QUESTION DOCTRINE WARRANTS DISMISSAL WHERE THE ACT IMPUGNED, ALBEIT THE RESULT OF EXECUTIVE POLICY, IS ALLEGED TO BE CLEARLY ILLEGAL

The political question doctrine, under one name or another, has traveled a rocky road from the early days of this Republic to the present. That there should be such a doctrine is a natural, indeed a necessary, concomitant of our tripartite system of government. For whenever the courts are faced with the task of ascribing unlawful conduct to one of the other two branches, their first instinct is to ask themselves "Dare we? Should we? Ought we? Must we?"

Sometimes, the answer is a resounding affirmative, even though aimed at the President himself: Thus, Chief Justice Marshall thought it inconceivable that the law should be "incapable of securing obedience to its mandate ... on account of the person against whom the complaint is made." Marbury v. Madison,5 U.S. 1 (Cranch) at 164. And Justice Jackson, in the steel seizure case, warned that "no penance would ever expiate the sin against free government of holding that a President can escape control of executive powers by law through assuming his military role," Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 646, (1952). At other times, as here, the courts make short shrift of claims against the executive.

Rarely, however, in contemporary

jurisprudence, do they do so by a mere legerdemain of nomenclature, i.e., by simply calling a legal question a political question. The rationale for the Court of Appeals decision of which review is sought is that "the decision to take covert rather than overt action was itself a policy decision and as such may not be reviewed in the lawsuit appellants have brought." (emphasis supplied) See, Petition for Writ of Certiorari at p.5a. More frequently, these days, courts will pass up the political question per se theory - indeed, will go out of their way to disavow it - in favor of "unmanageable standards" or one of the other criteria set out in Baker v. Carr, 369 U.S. 186,217 (1962). See, e.g., Crockett v. Reagan, 558 F.Supp. 893 (D.D.C. 1982), aff'd, 720 F.2d 1355 (D.C. Cir. 1983), cert. denied, 467 U.S. 1251 (1984) and

Judge Edelstein's opinion in Greenham Women Against Cruise Missiles v. Reagan, 591 F.Supp. 1332 (S.D.N.Y. 1984), aff'd,755 F.2d 34 (2d. Cir. 1985). In other recent cases, Judges have shown a marked preference for deciding on other than political question grounds. Thus, Judge Bork chose to write an opinion running to twenty-five printed pages to reach the same result as Judge Robb in the latter's brief political question decision, Tel-Oren v. Libyan Arab Republic, 726 F.2d 774,798 (D.C. Cir. 1984), cert. denied, 470 U.S.1003 (1985), (Bork,J.,concurring).[1]

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[1] "It is probably better not to invoke the political question doctrine in this case. That the contours of the doctrine are murky and unsettled is shown by the lack of consensus about its meaning among the members of the Supreme Court, see, Goldwater v. Carter, 444 U.S. 996 (1979), and among scholars, see, e.g., Henkin, Is There A 'Political Question' Doctrine?, 85 Yale

Similarly, Judge Scalia, as he then was, stated, at the outset of his opinion for the District of Columbia Circuit in Sanchez:

> Without necessarily disapproving the District Court's conclusion that all aspects of the present case present a nonjusticiable political question, we choose not to resort to that doctrine for most of the claims. Since we find other bases for dismissing the suit ... we prefer to rest our affirmance ... in most respects on other grounds. Sanchez-Espinosa v. Reagan, 770 F.2d 202, 206 (D.C. Cir. 1985)

This court has an opportunity, in this case, to shed some much needed light on what Judge Bork has called the "murky and unsettled" political question doctrine, and to do so in a

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L.J. 597, 622-23 (1976)," Tel-Oren, 726 F.2d. at 803, n. 8 (Bork, J., concurring).

manner which will make it clear that, whatever the doctrine holds, it does not relieve the lower courts of the duty to decide questions of law, even where the plaintiff is a foreign company and the matter touches foreign affairs.

II. FOR PURPOSES OF THE MOTION TO DISMISS, THE COURTS BELOW HAD TO ACCEPT PLAINTIFF'S ALLEGATION THAT DEFENDANTS' ACTIONS WERE CLEARLY ILLEGAL

1. The Failure of the United States to Provide Adequate Warning of the Mining Constituted Gross Negligence Under Domestic Tort Law.

Even accepting, arguendo, that, for military reasons, the mining itself had to be carried out covertly, the failure to provide adequate notice to international shipping as soon as the operation was completed constitutes gross and actionable negligence under ordinary principles of tort law. It is

analogous to failing to warn road traffic of an excavation in a street, or the absence of a guard railing on a bridge or the approach of a train at a grade crossing.[2] If this case arose in a domestic context, it would be difficult to conceive of a court holding that the negligence involved in the three hypothetical examples cited above was non-justiciable because it was the result of a policy decision.

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[2]. 28 U.S.C. Sec. 2674 provides that "The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances ..." Under this section, the United States has been held liable for injuries resulting from failure to give warning of a newly waxed floor in a post office, Moenck v. U.S, 264 F. Supp. 615 (D.C. Iowa 1966) and of the fact that a box marked "M-80 firecrackers" did not contain ordinary firecrackers, but Army explosive devices, Williams v. U.S, 352 F. 2d 477 (5th Cir. 1965).

2. The Failure to Provide Adequate Warning of the Mining Was In Clear Violation of International Law.

The mining operation at issue in this case prompted Senator Kennedy to declare "I challenge any member of this body to point to any provision of international law that, under any interpretation, permits this kind of unannounced death and destruction to be visited upon innocent civilians." 130 Cong. Rec. S4140 (daily ed. April 9, 1984), cited in Note, The Briar Patch of Reality; A Legal Analysis of the Mining of Nicaragua's Harbors, 18 N.Y.U.J. of Int'L. & Pol. 169, 220 (1985),(hereinafter, "N.Y.U. Note") Indeed, Senator Kennedy could have invoked the authority of a classic of modern international law, the Corfu Channel Case, 1949 I.C.J. Reports 4.

There, the International Court of Justice held Albania liable to the United Kingdom for damage to two British warships caused by mines of which Albania had knowledge of but of which it had failed to give either general or specific notice. The decision was based on "elementary considerations of humanity" and on the principle of freedom of the seas.This ruling was reaffirmed by the I.C.J. in its judgement in the Nicaragua case, where it held, by fourteen votes to one, "that the United States of America, by failing to make known the existence and location of the mines laid by it, ... has acted in breach of its obligations under customary international law." Judge Schwebel, the American judge, voted with the majority. Military and Paramilitary Activities in and against Nicaragua,

1986 I.C.J. 14, par. 292(8).

It is ironic that, barely three and a half years after the Nicaraguan mining operation, the United States is on the brink of war with Iran over what it has properly characterized as Iran's violation of international law in mining the waters of the Persian Gulf.

3. The Mining Operation Itself - Apart From the Failure to Warn - Was In Violation of International Law.

In its Nicaragua decision, the International Court of Justice held "that, by laying mines in the international or territorial waters of the Republic of Nicaragua during the first months of 1984, the United States of America has acted, against the Republic of Nicaragua, in breach of its obligations under customary international law not to use force against another State, not to intervene in its affairs, not to violate its sovereignty and not to

interrupt peaceful maritime commerce." 1986 I.C.J. 14 (1986), par. 292 (6). For procedural reasons, the I.C.J. decision was limited to violations of customary international law. The mining operation, however, was also clearly in violation of a number of treaties, including Art. 2(4) of the United Nations Charter, the Charter of the Organization of American States, 2 U.S.T. 2394, the Convention on Rights and Duties of States, 49 Stat. 3097, the U.S.-Nicaragua Treaty of Friendship, Commerce and Navigation, 9 U.S.T. 449 and several others discussed at N.Y.U. Note, pp. 199 ff.

4. Neither the President nor the Courts May Turn a Cold Shoulder to International Law.

The decisions below echo the holding of the Fifth Circuit in Occidental of Umm v. A Certain Cargo that "In their external relations, sovereigns are bound by no law." 577 F.2d 1196, 1204 (5th Cir. 1978). This is not only grievously bad law; if it became the general rule, it would make the United States the most lawless player in the international arena, since no other nation professes to adhere to such a rule (practice, of course, is another matter).

This case affords this court an opportunity to restate the correct rule, as it was stated, for instance, nearly a century ago, in Hilton v. Guyot, 159 U.S. 113, 163 (1895), ("International law, in its widest and

most comprehensive sense ... is part of our law, and must be ascertained by the courts of justice, as often as questions are presented in litigation between man and man, duly submitted to their determination") or, quite recently, by Judge Bork in Finzer v. Barru, 798 F.2d 1450, 1458 (D.C. Cir. 1986) ("We think it clear beyond quibble that since the founding of our nation adherence to the law of nations ... has been regarded as a fundamental and compelling national interest").

To mine the harbors of a country with which the United States is not at war - whether with or without notice to international shipping - is to act as if there were no international law. To say, as the Court of Appeals for the Second Circuit did in the decision below, that this case is non-justici able because the challenged action was

done as a result of a policy decision is to lend credence to the noxious myth that "in their external relations, sovereigns are bound by no law." Everything governments do, except in a purely ministerial capacity, is based on a policy decision. Does it follow that courts are free to pass, rather than pass judgement, on everything done by one of the other two branches which results from "a policy decision"? And if it does, do we still have a government of law, rather than a government of men and women?

CONCLUSION

For the reasons stated above the petition for certiorari should be granted and the judgement of the Second Circuit reversed.

Respectfully submitted,

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Dated: Nov. 9, 1987
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*Counsel wish to express their appreciation to B. Mullings-Rosa, Sonia Martinez, and Marylou Gramm for their work on this brief.

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Respondent.

BRIEF *AMICUS CURIAE* OF THE NORWEGIAN AMERICAN CHAMBER OF COMMERCE IN SUPPORT OF PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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CONSENT OF PARTIES

Amicus Curiae has filed this brief with the consent of Appellants and Appellees. Letters of Consent have been filed with the Clerk of the Court.

Interest of Amicus

The Norwegian American Chamber of Commerce, Inc. ("NACC") is a New York not-for-profit corporation established over seventy years ago. Its objectives include the following: "To foster trade, business, financial or professional interests, including the interests of those having common trade, business, financial or professional interests; to protect against oppressive or unlawful commercial practices; to secure freedom from unjust or unlawful imposts; to disseminate accurate and reliable information as to the standing of merchant and other matters; to procure uniformity and certainty in the customs and usages of trade and commerce; to settle differences between its members; and to promote an enlarged and friendly intercourse between businessmen. These activities are to be concerned primarily with commerce between Norway and the United States of America."

The headquarters of the organization, which has chapters throughout the United States and in Norway, are at 825 Third Avenue, New York, New York 10022. The membership of over 1200 includes corporations, individuals and associations, all of whom have a concern for peaceful international trade, particularly between the United States and Norway. Freedom of international trade is of particular importance to Norway which not only has a large fleet under the Norwegian flag but also has tonnage beneficially owned and insured by its nationals under "flags of convenience", as does the United States, such as those of Panama, Liberia, etc. The IVER CHASER, a Liberian flag vessel, is managed by Iver Bugge Management A/S of Larvik, Norway. A United States citizen has beneficial ownership in the Petitioner corporation as do Norwegian citizens. The insurer is Norwegian.

The NACC is concerned that the decisions of the United States Court of Appeals for the Second Circuit and the United States District Court for the Southern District of New York in this case may be construed internationally as giving United States at least tacit approval of actions which would jeopardize international trade and deny the right of compensation for clearly foreseeable damages inflicted by perhaps overzealous Government agents in executing policy decisions.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES vi

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT 1

ARGUMENT

I. WHERE, AS HERE, THE ACTS OF U. S. AGENTS WERE TORTIOUS AND UNLAWFUL, EVEN THOUGH IN FURTHERANCE OF AN EXECUTIVE POLICY DECISION, THE "POLITICAL QUESTION" DEFENSE SHOULD NOT BE ALLOWED TO INSULATE THE GOVERNMENT FROM LIABILITY FOR DAMAGE RESULTING FROM SUCH ACTS. 3

II. THE PRESENT "DOUBLE STANDARD" APPLIED BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN ITS HANDLING OF THIS CASE AND THE RECENT CASE OF AMERADA HESS SHIPPING CORPORATION V. ARGENTINE REPUBLIC REQUIRES THAT THIS CERTIORARI BE GRANTED . . . 7

III. IT IS IMPORTANT THAT THIS COURT AFFIRM THE OBLIGATION OF ALL GOVERNMENTS, INCLUDING THAT OF THE UNITED STATES OF AMERICA TO RESPECT INTERNATIONAL LAW. . . 9

CONCLUSION:

For the reasons set forth above in the Petition dated September 4, 1987, the Supplemental Brief dated October 2, 1987, and in the Brief Amicus of the Center for Constitutional Rights dated November 9, 1987, the Petition for Certiorari should be granted and the judgment of the Second Circuit reversed. 11

TABLE OF AUTHORITIES

Page

Amerada Hess Shipping Corporation v. Argentine Republic, 830 F. 2d 421 (2d Cir. 1987), petitions for rehearing denied, Nos. 86-7602, 86-7603 (Nov. 18, 1987) 1, 7-8, 9-10

Marbury v. Madison, 5 U. S. (1 Cranch) 137, 177 (1803) . . . 2, 8

Moenck v. United States, 264 F. Supp. 165 (D. C. Iowa 1966). . 3

Occidental of Umm v. A Certain Cargo, 577 F.2d 1196, 1204 (5th Cir. 1978) 8

Williams v. United States, 352 F.2d 477 (5th Cir. 1965) 3-4

International Case Cited

Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U. S.), 1986 I.C.J. 14 (Judgment of June 27, 1986), also reprinted in 25 I.L.M. 1023 (Sept. 1986) 1

Statutes and Rules Cited

Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680 4

Suits in Admiralty Act, 46 U.S.C. §§ 741 et seq. 4

Page

Other Authorities Cited

E. Gordon, "American Courts, International Law and 'Political Questions' Which Touch Foreign Relations", 14 Int'l Law. 297 (Spring 1980) 2-3

Hersh, "Who's in Charge Here?" N. Y. Times, Nov. 22, 1987, § 6 (Magazine) at 62 5

Report of the Congressional Committees Investigating the Iran-Contra Affair, Pub. Nov. 13, 1987. Union Calendar No. 277 100th Congress, 1st Session. H. Rep. No. 100-433, S. Rep. No. 100-216 4-5

REASONS FOR GRANTING THE WRIT AND SUMMARY OF ARGUMENT

The modern world has been horrified by the wanton damage currently being inflicted upon shipping by the mining and bombing activities in the Iran-Iraq conflict and earlier during the 1982 Falklands War. See Amerada Hess Shipping Corporation v. Argentine Republic (hereinafter "Amerada Hess"), 830 F.2d 421 (2d Cir. 1987), petitions for rehearing denied, Nos. 86-7602, 86-7603, (Nov. 18, 1987), referred to beginning at page 2 of Petitioners' Supplemental Brief. The equally shocking mining of Nicaraguan waters by agents of the U. S. Government without adequate warning to international shipping was held to be violative of international law by the International Court of Justice, 1986 I.C.J. 14 (see pages 6, 7 and 26 of the Petition herein). A refusal by this Court to review the decisions below

denying the vessel owners and insurers the right to press their claim for clearly foreseeable consequences of the acts of agents of the U. S. Government would further shock the civilized world.

Use of the "political question" argument to avoid deciding a genuine legal question presented by a party with proper legal standing is a practice, however often utilized in recent years by Federal judges, which is not in accordance with the duty of judges "to say what the law is", Marbury v. Madison, 5 U. S. (1 Cranch) 137, 177 (1803). As stated by E. Gordon in "American Courts, International Law and 'Political Questions' which Touch Foreign Relations", 14 Int'l Law. 297, 329 (Spring 1980), it is time ". . . for the courts to rethink the implications which the political question doctrine holds for constitutional government - and

for the place of international law in the American judicial process."

ARGUMENT

I. WHERE, AS HERE, THE ACTS OF U. S. AGENTS WERE TORTIOUS AND UNLAWFUL, EVEN THOUGH IN FURTHERANCE OF AN EXECUTIVE POLICY DECISION, THE "POLITICAL QUESTION" DEFENSE SHOULD NOT BE ALLOWED INSULATE THE GOVERNMENT FROM LIABILITY FOR DAMAGE RESULTING FROM SUCH ACTS.

As pointed out by the Center for Constitutional Rights (Amicus Brief, pp. 7-8), liability arises where an entirely proper activity, such as road repairs or railroad operations, has been accompanied by failure to warn of danger. For example, the United States has been held liable for damages resulting from failure to warn of newly-waxed floors in a post office, Moenck v. United States, 264 F. Supp. 165 (D. C. Iowa 1966), or because of improper labels on a package of explosives (Williams v. United States, 352 F.2d 477

(5th Cir. 1965). In this case, the bases for liability of the United States are the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671-2680 and the Suits In Admiralty Act, 46 U.S.C. § 741 et seq. and the specific acts complained of are those of U.S. Government agents or employees, discussed in the Petition herein. That such persons were really involved is no longer in question.

See page 36 of the Report of the Congressional Committees investigating the Iran-Contra Affair, pub. Nov. 13, 1987, Union Calendar No. 277, 100th Congress, 1st Session, H. Rep. No. 100-433, S. Rep. No. 100-216, which states categorically "On January 7 [1984], three magnetic mines were placed in Sandino Harbor; on February 3, an air attack destroyed a Sandinista communications and naval arms depot, and on February 29 more mines were placed at Corinto." It was obviously one of the

mines at Corinto which damaged the IVER CHASER on March 28. There would have been plenty of time in which to issue warnings, and if such had been done, the IVER CHASER would not have been damaged. See also the article by Seymour M. Hersh in his New York Times Magazine, "Who's in Charge Here?" on Sunday, November 22, 1987 which states at page 62, a U. S. Army unit was involved in the supply of "small boats used by the C.I.A. to mine harbors" in Nicaragua and an Army helicopter mechanic "was aboard the C.I.A. ship that directed the 1983 mining of harbors inside Nicaragua, an action subsequently adjudicated by the World Court at The Hague to be a violation of international law."

The United States holds itself out to be a model of fairness and an adherent of international law. Refusal by this Court to review the decisions below in this case could be viewed as at least tacit

approval at the highest level of actions condemned by the World Court at The Hague to be in violation of international law: nations of the world could then well ask, "Since the United States can do it, why can't we do it - or something similar - too?"

In its Brief Amicus, the Center for Constitutional Rights avers that the theory espoused by the courts below would, if it became the general rule, "make the United States the most lawless player in the international arena" (p. 13). As also stated by the Center for Constitutional Rights (p. 14), "To mine the harbors of a country with which the United States is not at war - whether with or without notice to international shipping - is to act as if there were no international law."

II. THE PRESENT "DOUBLE STANDARD" APPLIED BY THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN ITS HANDLING OF THIS CASE AND THE RECENT CASE OF AMERADA HESS SHIPPING CORPORATION V. ARGENTINE REPUBLIC REQUIRES THAT CERTIORARI BE GRANTED.

As pointed out in Petitioners' Supplemental Brief dated October 2, 1987, Amerada Hess and this case involve alleged violations of "settled principles of international law" by employees or agents of the respective governments and each involves claims for a tort only. In Amerada Hess, the Court of Appeals for the Second Circuit on September 11, 1987 properly reversed a District Court decision dismissing a suit for damages by a United States interest Liberian tanker owner against the Argentine Republic under facts strikingly similar to those in this Petition which involves dismissal of a suit for damages by a Norwegian interest Liberian tanker against the United States. Is it merely coinci-

dental that the suit against the United States was dismissed and jurisdiction over the suit against the Argentine Republic retained? The world at large would have trouble accepting that! And lawyers, familiar with the "policy question", know that use of this doctrine to avoid deciding a case where a genuine legal question is duly presented to a court of competent jurisdiction is contrary to the rationale of Marbury v. Madison, supra. Furthermore, as stated at page 15 of the Brief Amicus by the Center for Constitutional Rights, resort to this doctrine would "lend credence to the noxious myth that 'in their external relations sovereigns are bound by no law'" (see Occidental of Umm v. A Certain Cargo, 577 F.2d 1196, 1204 (5th Cir. 1978).

III. IT IS IMPORTANT THAT THIS COURT AFFIRM THE OBLIGATION OF ALL GOVERNMENTS, INCLUDING THAT OF THE UNITED STATES OF AMERICA TO RESPECT INTERNATIONAL LAW.

A decision of this Court that could be construed to give at least tacit approval to the mining of either international waters or of waters of non-belligerent nations would be a blow to the development of freedom of international commerce. Even the United States by implication recognizes this fact, albeit in a different but sufficiently analogous situation. See the United States Brief as Amicus Curiae in Support of the Argentine Republic's Petition for Rehearing en banc in the Amerada Hess case, filed October 19, 1987 at page 4: "the United States does not condone violations of international law by sovereign states and considers that Argentina should bear responsibility for

its actions that are the subject of the instant litigation . . . "

The practical effect of a denial of the Petition herein could be interpreted by the world community as an unwillingness to face the consequences with respect to the legal consequences of unlawful and tortious execution of executive policy decisions under the guise of the "political question" defense. For the United States to be seen in such a light would be harmful to international commerce and to the moral standing of the United States.

CONCLUSION

For the reasons set forth above in the Petition dated September 4, 1987, the Supplemental Brief dated October 2, 1987, and in the Brief Amicus of the Center for Constitutional Rights dated November 9, 1987, the Petition for Certiorari should be granted and the judgment of the Second Circuit reversed.

Respectfully submitted,

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